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IN THE

Supreme Court of the United States

WILMINGTON HOSPITALITY, LLC,
Petitioner,

v.

NEW CASTLE COUNTY,
Respondent.

Petition for a Writ of Certiorari to the Delaware Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court below erred in deciding that a landowner bringing an equal protection claim may only satisfy the requirement that the landowner identify similarly situated landowners by identifying landowners that are prima facie identical?

II. Whether the court below erred in deciding that a factfinder in a "class of one" equal protection claim may not consider the overall treatment afforded a landowning plaintiff in determining whether the government's actions are irrational or arbitrary?

III. Whether the court below erred in deciding that a landowner did not state a claim for inverse condemnation where the landowner alleged that the Defendant County prohibited the landowner, its principals and any person related to the principals from owning the subject property for twenty years?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Petitioner states that the parties to the proceeding in the Delaware Supreme Court are the same as the parties to this proceeding: Petitioner Wilmington Hospitality, LLC and Respondent New Castle County.

RULE 29.6 STATEMENT

Petitioner is a privately held limited liability company. It has no parent corporation and no publicly-traded entity owns any interest in it.

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IN THE

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No. 08-__

WILMINGTON HOSPITALITY, LLC,
Petitioner,

v.

NEW CASTLE COUNTY,
Respondent.

Petition for a Writ of Certiorari to the Delaware Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Wilmington Hospitality, LLC ("WH" or "petitioner") hereby petitions for a writ of certiorari to review the judgment of the Delaware Supreme Court in *New Castle County v. Wilmington Hospitality, LLC*, 2008 Del. LEXIS 593 (Del. Dec. 22, 2008).

OPINIONS BELOW

The decision of the Delaware Supreme Court is unpublished and available at *New Castle County v. Wilmington Hospitality, LLC*, 2008 Del. LEXIS 593 (Del. Dec. 22, 2008). It is reprinted at App. 56a-68a. No request for rehearing or rehearing en banc was filed in this matter.

The Delaware Supreme Court reversed the decision of the Delaware Superior Court, which is available at

Wilmington Hospitality, LLC v. New Castle County, 2007 Del. Super. LEXIS 384 (Del. Super. 2007), and reprinted at App. 38a-55a. The Delaware Supreme Court affirmed the following decisions of the Delaware Superior Court: *Wilmington Hospitality, LLC v. New Castle County*, C.A. No. 03C-07-213 MMJ (Del. Super. 2004, reprinted at App. 1a-15a; *Wilmington Hospitality LLC v. New Castle County*, 2004 Del. Super. LEXIS 346 (Del. Super. 2004), reprinted at App. 16a-19a; and *Wilmington Hospitality, LLC v. New Castle County*, 2005 Del. Super. LEXIS 189 (Del. Super. 2005), reprinted at App. 20a-37a.

JURISDICTION

The Delaware Supreme Court entered its judgment and opinion on December 22, 2008. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution and the Takings Clause of the Fifth Amendment to the Constitution. U.S. CONST. Amend. 5, 14, reproduced at App. 93a. Suit was brought under 42 U.S.C. §1983, reproduced at App. 95a.

STATEMENT OF THE CASE

I. Factual Background

A. The Record Plan

Petitioner Wilmington Hospitality, LLC ("WH"), a Delaware limited liability company, is the former owner of the Radisson Hotel located in New Castle County, Delaware. At all times material hereto,

WH's principals were Joseph L. Capano and Albert A. Vietri.[1]

In November, 1989, New Castle County ("County") zoned the site to allow for a 6-story 195-room full-service hotel. WH's predecessor, Hodev, Inc. ("Hodev") obtained final plan approval in April, 1990 ("Record Plan"). The Record Plan depicted a 118,805 square foot 6-story 195-room hotel, including 202 parking spaces as required for compliance with the then applicable County code. App. 209a; A001; B016; B390 at 64.[2]

B. Architects and Engineers prepare plans

Joseph Chickadel, an architect with Design Collaborative, Inc. prepared the original design for the hotel based on the arrowhead-shaped design of a hotel Capano and Chickadel visited in Arizona. B468 at 18-19. With the plans from the Arizona hotel as a model, Chickadel prepared drawings for a 6-story 191-room hotel. He assumed that the first-floor footprint, which was about 26,000 square feet, applied to all the other floors of the hotel. B469 at 21-22. If he had scaled back each upper floor to roughly 18,000 square feet, the 118,805 square-foot limitation imposed by the Record Plan would have been met. B469 at 21-22. Chickadel did not complete his drawings because the hotel industry went flat in 1990, and the project was shelved. B469 at 22.

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[1] Mr. Vietri passed away on June 29, 2008.

[2] The Appendix to this Petition is referred to as "App. ___." The County's Appendix in the Delaware Supreme Court is referred to as "A___." WH's Appendix in the Delaware Supreme Court is referred to as "B ___."

When the hotel industry improved in 1997, WH contacted Chickadel to complete the drawings, but he said it would take over eight months to do so, and the price could not be agreed upon. B470 at 25. WH then hired Kevin Wilson, an architect with Architectural Alliance, Inc., to complete the plans. B470 at 25.

Believing that the design reflected in Chickadel's drawings complied with applicable approvals, Wilson did not check the Record Plan, but instead completed drawings for the hotel based on Chickadel's drawings. B385-386 at 6-9. Unlike office or retail space where square footage is the relevant economic measure, hotel economics are determined by the number of rooms and other services offered. B466-67 at 12-13; B423 at 38-39; B424 at 67-68. As a result, WH's principals focused on the number of rooms and additional services offered, not square footage, and did not know that the final design exceeded the square footage limitations set forth in the Record Plan that had been approved seven years earlier. B423 at 38-39; B424 at 67-68.

C. The County issues permits and the Hotel is constructed

On June 5, 1998, Architectural Alliance filed an application for a building permit with the County on Hodev's behalf. A020. Architectural Alliance provided detailed drawings showing the 6-story 191-room full service hotel with a gross floor area estimate of 155,480 square feet. A020, B386 at 10-11. The drawings showed all of the hotel's ancillary uses including the kitchen, ballroom, restaurant and meeting rooms. B493 at 144; B387 at 15.

On July 21, 1998, approximately 47 days after the submission of Hodev's application, and after the

County thoroughly reviewed the architectural drawings, the County issued Building Permit No. 1953 allowing for the construction of the 6-story 155,480 square foot hotel. App. 214a; B387 at 14; B502 at 203-204. Under the space entitled "Approval Record (Office Use Only)," the County referenced the Record Plan by number. App. 214a.[3]

Prior to construction, Hodev conveyed its interest to WH. The principals of Hodev are the same as WH. Following the issuance of the Building Permit in July 1998 and continuing through May 2000, the hotel was constructed. During construction, the County routinely conducted inspections and issued numerous permits. B021-068; B382 at 62; B419-420 at 144,145. At no point during construction did the County ever suggest that the Building Permit or any of the other permits that had been issued were invalid, nor did the County indicate that there was any discrepancy between the building as constructed and the Record Plan. B382 at 62-63.

In good-faith reliance on the Building Permit issued by the County for the construction of the hotel as indicated on Architectural Alliance's drawings, WH incurred $23.6 million in construction costs. B485 at 21; B492 at 133; B472 at 40. WH's principals invested $8.4 million and guaranteed loans for the balance.

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[3] The County determined that the allowable square footage per floor could be as high as 47,000+ feet, but noted the actual square footage of the hotel as designed could be 28,000+ feet per floor, *i.e.* more than 168,000 square feet in total. App. 215a. The County charged Hodev about $70,000 to, in part, defray the cost of plan review. App. 218a.

In Spring 2000, the first four floors of the hotel were ready to open, subject to completion of final punch-list items. B474-475 at 48-49; B382-383 at 64-65; B515 at 12; B089. The hotel was complete to the point that it was fully furnished with amenities, linens and art work. B069-079; B477 at 57-59; B382-383 at 64, 65. In April 2000, the County issued a temporary certificate of occupancy for the hotel's kitchen and training rooms. B080. The hotel ran test dinners and hired approximately 100 people in anticipation of opening Memorial Day weekend. B474 at 47-49; B382 at 63-64; B383 at 65-67. By this time, there were $500,000 in booked reservations. B383 at 66-67.

On May 12, 2000, in response to WH's request for an inspection for a certificate of occupancy, employees of the County's Department of Land Use ("DLU") visited the site and noted that the parking configuration did not appear to conform to the Record Plan. WH's engineers met with County officials to address any concerns regarding parking and submitted a record resubdivision plan on May 31, 2000, showing the reconfigured spaces. B081-082, Note 5. As a result of the May inspection, it was discovered for the first time that the Radisson had been built larger than as indicated in the Record Plan. The County was uncertain as to whether to apply an earlier version of the code to determine the required amount of parking or to apply the stricter, then current code—the Unified Development Code ("UDC"). B510-511 at 235-238. On June 6, 2000, WH submitted an exploratory sketch plan proposing to add a parking deck to meet the UDC requirement. B083-084; B085-088; B392-395 at 84-90; B397-398 at 147-149. WH was willing to comply with whatever park-

ing requirements the County deemed necessary. B475-476 at 51-56; B494-495 at 147-149.

D. County Executive decides that the Hotel will never open

In or about mid-June 2000, then County Executive Thomas Gordon announced to his staff that "The Radisson will never open while I am County Executive." B409 at 79. Prior to completing any investigation, Gordon accused the hotel's owners of making intentional "misrepresentations" to the County. B410 at 84. As Lynda Maloney, Executive Assistant to then County Chief Administrative Officer Sherry Freebery, explained, "The attitude at the Executive Office was that there wasn't anything that Wilmington Hospitality could do to get a CO [certificate of occupancy]. So, no matter what Wilmington Hospitality might have suggested or presented, the Executive Office was not going to issue a CO." B416 at 106. It made for good headlines to be known as being against Capano and Vietri. B411 at 87.

On June 22, 2000, the County revoked WH's Building Permit, claiming that WH had provided "false statements or misrepresentations of fact in the application and/or on the plans on which the permit or approval was based." B090-091. Even though the Record Plan was on file with the County, recorded in the Recorder of Deeds office and specifically referenced by the County when it issued the Building Permit, the County claimed that it was duped into issuing the Permit as part of a conspiracy by WH's principals and the architects and engineers on the project. A054 at 12,13; B090-91. George Haggerty, the Code official who revoked the permit and later spearheaded an extensive "investigation" of the alleged conspiracy, admitted at trial, however, that

Vietri had not done anything to deceive the County and that he had no personal knowledge of when Capano learned of the discrepancy between the Record Plan and the building as constructed. B516 at 23; B522 at 73.

On June 30, 2000, WH requested a stay of the revocation of the Building Permit. B092. The General Manager of the DLU ordered a stay of the revocation of the Building Permit on July 12, 2000 stating, "I cannot conclude as a matter of fact or law that continued work under the challenged building permit would place the health, safety or welfare of the public in jeopardy." A049. On July 31, 2000, however, the County's Board of License, Inspection and Review affirmed the revocation of the permit, effectively shutting down any continued activity at the site.

E. The County's investigation and Variance Hearing

In a letter dated July 12, 2000, James Edwards, a DLU Assistant Land Use Administrator, asked a BOCA representative for an interpretation regarding whether a "false statement" or "misrepresentation of fact" provided in a permit application by *mistake* or *without knowledge* would warrant revocation of a permit. B101. The very next day, the DLU submitted a position paper to the County Board of Adjustment ("BOA") claiming that WH and its agents "did not act in good faith when providing the Department with false statements and misrepresentations of fact on the building permit application." A054 at 12-13. The paper also noted that the County Attorney had *initiated* an investigation regarding the discrepancies between the Record Plan and the hotel as-built. A054 at 4. As part of its investigation, County personnel interrogated approximately 21 people under oath in

closed-door sessions for hours on end (without counsel in approximately 19 of the sessions), and subpoenaed thousands of documents without notice to WH or its counsel. No criminal or civil charges were ever filed against WH's principals by the County or, for that matter, any governmental agency. The County never issued any findings nor formally concluded its investigation. B507 at 223-234; B522 at 75; B529 at 142-143; B477 at 59-60; B478 at 61-63; B397-388 at 16-19; B395-396 at 90-95; B421 at 149-151.

WH next applied to the County's BOA for variances to allow the opening of the hotel, including variances: (1) to increase the maximum floor area ratio to address the discrepancy between the hotel as built and the square footage on the Record Plan; (2) for an encroachment in the floodplain; and (3) for a reduction in what the County was asserting were the number of required parking spaces from 325 to 202. WH also asked for a beneficial use appeal determination. A054 at 13-16; B525 at 123.

The BOA held hearings on WH's application for variances on July 13 and July 26, 2000. Then County Chief Administrative Officer Freebery and other County officials attended these hearings. B511-512 at 240-241; B426-427 at 88-89. On July 27, 2000, the BOA held a business meeting to announce its decision on WH's application. The Chairman, Thomas Marconi, voted in favor of the key variances. Marconi found that the County's contention that WH conspired to build the hotel larger than permitted made no sense and noted that there were many other instances in which the BOA had approved similar variance applications. B427 at 90-91; B429 at 103-104. At trial, Marconi further explained his vote:

> I believe[d] the testimony that legitimate errors were made. I thought that the County had some culpability in it, because I think they issued a building permit that permitted construction of square footage beyond what was approved in the Record Plan and I just felt that if you go into the idea that you should follow due substantial justice and follow the spirit of the zoning code, given that they had not proved anything in my eyes anything underhanded, I thought that it was the right thing to do and I felt there were many other situations before where we had voted to approve things that were similar.

B429 at 103-104. The remaining Board members voted against most of the variance requests, and denied the key variances. Minutes after the meeting ended, Freebery confronted Marconi demanding that he immediately follow her to her office so that she could talk to him about his future as Chairman. B427 at 91-92. Instead of following Freebery to her office to try to keep his job, Marconi told Freebery that he would rather resign his position. B427 at 92. Without waiting for Marconi's letter of resignation, Freebery sent Marconi a letter confirming his resignation. B428 at 93. Freebery's Executive Assistant testified that the Chairman was asked to resign because "he wasn't voting the way they wanted him to vote." B417 at 115-116; B413-414 at 91-93; B415 at 102, 103.

F. WH's request to open 102,120 square feet and the County's unreasonable demands.

On August 16, 2000, WH asked for permission to open the hotel's first four floors comprising 102,120 total square feet, which was substantially less than the 118,805 square feet stated in the Record Plan.

B109; B401-402 at 16-19. That same day WH submitted a revised plan reflecting the closure of any square footage beyond that permitted by the Record Plan. B105-108; B479-480 at 67-69. WH also submitted a report prepared by Duffield Associates addressing the County's concerns regarding the floodplain. B109. On August 22, 2000, WH again requested permission to open 102,120 square feet of the hotel. B112; B402 at 19-20.[4]

On September 25, 2000, Duane Werb, counsel for WH's lender, Republic Bank, met with Freebery, Shawn Tucker, the General Manager of the DLU, William Rhodunda, the County Attorney and County Code Official Haggerty. B116. At the meeting, the County presented three options in order to open 102,120 square feet of the hotel: "(1) total destruction of the Radisson, (2) removal of the fifth and six floors of the Radisson and (3) filling all excess square footage with foam." B116. Haggerty testified that he had no idea of the type of "foam" that would be used, how the "foaming in" would be accomplished or whether "foaming in" would result in environmental hazards. B513 at 247-48. The County presented these demands to WH and its bank without first exploring whether they were practical, let alone possible. Yet the County made these demands express conditions to be met before it would permit the opening of 102,120 square feet of the hotel. The County was "deadly serious" about these demands.

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[4] Section 118.2 of the BOCA Code adopted by the County provided for issuance of a temporary certificate of occupancy provided that the subject space could be occupied safely prior to full completion of the structure. B017. The DLU had previously found that continued work at the site would not jeopardize the health, safety or welfare of the public. A049.

B402-405 at 20-30; B416 at 106-107. The Bank declared the loan in default. B116; B481 at 74.

On October 6, 2000, WH again requested a temporary certificate of occupancy in order to open 102,120 square feet. B121; B404-405 at 28-30. WH offered to reduce seating in its restaurant to ensure that any parking requirements would be met. B121 at 2. WH also asked for a response to the Duffield Associates floodplain report it had previously provided to the County. B121. By letter dated October 14, 2000, the County effectively rejected WH's request by conditioning the opening of 102,120 square feet on "Removing or foaming in all square footage built over 118,805." A097. The County understood that these acts would destroy the building. In fact, in granting virtually identical variances to Parkside V, LLC, the entity that subsequently bought the hotel from Republic Bank, WH's lender, after WH went bankrupt, the County's BOA found that reduction of the hotel's size "may not be possible let alone practical. Whether demolishing the hotel's top floors, or removing a portion of the sides of the building to conform to the footprint shown on the 1990 record plan, the structure was not built to withstand the stresses caused by a partial demolition." A238 at 3.

On October 18, 2000, WH sued the County in the Delaware Court of Chancery seeking injunctive relief to allow the hotel to open. When the court denied WH's motion for a temporary restraining order, WH attempted to reach an agreement with the Bank in order to get the matter resolved. In November 2000, however, the County made an additional demand. The County required a deed restriction barring Capano, Vietri and all members of their families including their respective spouses, children, grandchil-

dren, brothers, sisters, aunts, uncles, cousins, nieces and nephews from having an ownership interest in the hotel property for a period of twenty years. B405-407 at 30-37; B416 at 106-107; B501 at 190-191. Freebery's assistant testified that the "County wanted that Wilmington Hospitality's owners, their children, and their children's children would never have anything to do or any interest in the Radisson Hotel . . . that was a requirement from the Executive Office." B416 at 106-107. Code Official Haggerty likewise testified that the County decided that Capano, Vietri and their relatives could not own the hotel property. B517 at 26.[5]

The County never gave any legal basis for its ownership ban. B405 at 31. Capano and Vietri's children, grandchildren and other relatives had nothing whatsoever to do with the Radisson. B405 at 32; B496 at 159-160. In light of the County's demands, WH could not open any part of the hotel or meet its financial obligations. In December 2000, the Bank instituted foreclosure proceedings in the Superior Court of Delaware.

WH next decided to try to sell the property. On February 2, 2001, the County Attorney issued a letter outlining the matters to be addressed before a temporary or permanent certificate of occupancy could be issued for the hotel. A105. The removal of any floors of the hotel was not required.

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[5] In fact, nearly two years after WH lost title to the hotel, the DLU in connection with Parkside's application for variances was still demanding a deed restriction barring Capano, Vietri and their relatives from having any ownership interest in the property for twenty years. A215 at 13-14; App. 135a.

WH subsequently negotiated to sell the property to Remington Hotel Corporation. By letter dated April 19, 2001, the County Attorney reiterated that the February 2 letter addressed the items necessary for the hotel's operation. A131 at 3. The County again demanded a "restrictive covenant on the property against ownership, management or any financial interest, for a period of twenty years, in the property, directly or indirectly, by Joseph L. Capano, Albert Vietri, or their respective spouses, children and the siblings and cousins of Capano and Vietri." *Id.* at 2. The County also required that the purchase price be less than WH's investment. *Id.* at 2; B406 at 33. The ownership ban was considered a cloud on title so the Remington deal fell through. B481 at 74-76.

G. WH is forced to declare bankruptcy

In May 2001, the Bank stepped up its efforts to foreclose on the hotel and pursued actions against WH's principals as guarantors. In June, 2001, WH filed for bankruptcy under Chapter 11 of the Bankruptcy Code.

Following the bankruptcy filing, WH agreed to sell the property to MSJ Realty Trust, Inc. ("MSJ") for $22.5 million. B124. MSJ was afforded a $1.5 million credit to complete the building and to address any parking or floodplain-remediation requirements. B159.

On July 30, 2001, Fred Cohen, an attorney for MSJ, spoke with Rhodunda, the County Attorney, to determine what issues had to be resolved before a certificate of occupancy could be obtained. A135. By letter dated August 15, 2001, the County Attorney notified Cohen that all such issues were addressed in his February 2 letter. A135.

On September 13, 2001, WH's bankruptcy attorney confirmed that a meeting would be scheduled among

County officials, Morton Branzburg, the attorney for the Creditors' Committee and Cohen. B168. Two meetings with Freebery followed at which she reiterated the County's demand that the property be sold to a third party having no affiliation with Capano, Vietri or their relatives. B450 at 55; B451 at 58-59; B462 at 105-106.

On September 25, 2001, County officials including Haggerty and Mary Jacobson, an Assistant County Attorney (who had been assigned to handle the matter as Rhodunda had left his employ at the County) met with Albert Ciardi, III, WH's bankruptcy attorney, Wilson, Cohen and Branzburg to discuss what was needed to obtain a temporary certificate of occupancy. Haggerty stated that a temporary certificate could be issued within several weeks after compliance with the terms of the February 2 letter. B452-455 at 66-77; B457 at 90; B458 at 96; B460 at 97; B462-463 at 108-112.

Consistent with the September 25 meeting, WH, its attorneys, architect, engineers and certain creditors prepared documents requested in the February 2 letter. Ciardi prepared an extensive spreadsheet detailing various steps to be taken to satisfy the conditions outlined in the February 2 letter. B170. In mid-October, Ciardi sent e-mail to Haggerty regarding progress on satisfying the conditions for the temporary certificate of occupancy. B169. Ciardi also sent a letter to Jacobson dated October 26 transmitting as-built architectural drawings. B232. On November 1, Ciardi sent a facsimile to the County confirming that the County would not require foaming in or destroying the fifth and sixth floors as a condition to issuing a temporary certificate of occupancy. B256. Consistent with the County Attorney's February 2

letter, Jacobson had earlier told Ciardi that removal of the fifth and sixth floors would not be required. B457 at 90, 91.

Meanwhile, on or around October 26, 2001, Haggerty and Jacobson met with Freebery. B519-520 at 50, 51. At that meeting it was decided that the temporary certificate of occupancy would be "taken off the table." B519 at 45-47; B520 at 50-51; B456 at 87-88; B435-436 at 208, 209. No one informed Ciardi, Branzburg or Cohen of this development. B520 at 50-51.

Then, by letter dated November 2, 2001, the County informed Branzburg, Ciardi and Neal Belgam, an attorney for Republic Bank, that the February 2 letter "has no efficacy." A145. WH would have to physically remove two floors of the hotel. A145. Branzburg wrote to the County on November 5 stating, "Your letter of November 2, 2001 which purports to set forth the County's position is diametrically opposed to the prior representations and discussions on this issue. Now the County appears to be taking the position that the only way in which the hotel can be open at all is to remove two floors of 'excess square footage'." B300. The County never replied to Branzburg's letter. Morris Stoltz, a principal of MSJ, and Cohen concluded that the County was acting in bad faith. B431 at 122.

On November 2, 2001, prior to its receipt of the County's letter of the same date, WH had agreed to sell the hotel to Reese Hotels, LLC ("Reese"). B258. Under the terms of the Reese agreement, which was approved by the Bankruptcy Court, the property would be sold to Reese for $22.8 million with a credit of $1.5 million for the cost to be incurred in completing the hotel. B258 at 2; B295. WH was required to

obtain a certificate of occupancy for the transaction to close. B273 at ¶11 (1). WH subsequently learned that the County decided that the February 2 letter was of "no efficacy" and that WH would have to physically remove two floors. A145.

On November 27, 2001, WH settled with the Bank. B240. WH could have satisfied its obligation to the Bank by paying the Bank $13.85 million by March 31, 2002. Under the Reese agreement, WH would have netted $7.45 million, which was calculated by deducting the $1.5 million completion credit and bank debt of $13.85 million from the $22.8 million purchase price. $7.45 million is nearly $1 million less than WH's principals invested in the hotel, but it would have allowed WH to recoup some of its investment and pay its creditors. B240; B258; B464 at 113-115; B543 at 27-28. Even though the Reese sale agreement was approved by the Bankruptcy Court, the County made no attempt to cooperate in the sale.

In November 2001, the Town of Newport, Delaware, was considering whether to annex the hotel property. Newport discontinued its consideration of the annexation after being told by Gordon and Freebery that "Nothing that they had before New Castle County would go through, there would be no help given them for anything." B410 at 82-83; B482-483 at 82-85.

It was clear by this time that the County was simply bent on not only stripping WH of its ownership interest, but also seeing that WH did not recoup any of its losses. Bankruptcy was considered a "victory" by the County Executive's Office. B416 at 107. Gordon stated, "Good—they're losing all their money. Good." B409-410 at 80-81. Title to the hotel went to the Bank on April 2, 2002.

H. The County's treatment of similarly situated landowners

At trial, WH presented evidence regarding seven other commercial projects in the County where the building which had been constructed or was under construction substantially exceeded the square footage permitted by the applicable record plan or Code and the County granted variances, allowed the other projects to proceed and did not subject them to the treatment afforded WH. In five of the other projects, two of which were hotels, the percentage by which the square footage varied from the record plan or Code was equal to or greater than the percentage difference in WH's circumstance.

Krishnas, LLC Hotel Project. Krishnas, LLC ("Krishnas") was in the process of constructing a Country Inn and Suites hotel when the County learned of a 3,000 square-foot discrepancy between the record plan and the construction plans. App. 220a; A044. An attorney for a contractor on the project submitted a detailed analysis showing that the Krishnas' plans would actually improperly allow construction of 13,000 square feet beyond the 28,350 square-foot limit of the record plan. B521-522. Thus, the difference between what the contractor's attorney maintained the Code allowed and what Krishnas was constructing was approximately 43% and 46% beyond that permitted by the record plan. No demands were made to dismantle the hotel's foundation or to bar the landowners or their families from having any interest in their property. Instead, Krishnas received a variance to allow it to complete its construction of the hotel and the hotel subsequently opened. App. 219a-223a; A044; B506-507 at 219a-223a. The Krishnas

decision was rendered on June 28, 2000, four weeks before WH's variance application was denied.

Parkside V, LLC. On May 27, 2003, the Delaware Racing Association, the predecessor in interest to Parkside, purchased the Radisson property from Republic Bank, WH's former lender. B303. The contract contained a clause precluding the buyer from conveying title to WH's principals or their family members. B303 at 12.

Parkside requested variances tracking those that had been sought by WH including: (1) increasing the maximum permitted gross floor area to accommodate the building's square footage; (2) reducing the number of required loading berths from three to one; (3) reducing paving setback requirements; (4) reducing the opacity requirement along Airport Road; (5) reducing the required landscape surface ratio; and (6) permitting an encroachment into the floodplain. Parkside did not have to apply for a parking variance because the County agreed that it could use land adjacent to the site that Parkside had bought from the State. B531 at 171-172. WH had also been negotiating with the State to use adjacent land to remedy the parking issue. B475-476 at 53. However, the County was not interested in this or any other parking remedy offered by WH, including its offer to use eighteen acres that it owned across the street from the hotel for valet parking or an on-site parking deck. B475-476 at 52-55; B083-084 at Note 13. Parkside also got approval to remediate the floodplain through Duffield Associates by using the same plan Duffield earlier proposed for WH. B517 at 26; B533 at 186-187; B399 at 157-159; B487-488 at 108-110; B490-491 at 128-131.

Parkside offered the County a deed restriction barring Capano and Vietri and their relatives from owning the property for a period of twenty years from the date of the Board's variance decision. App. 135a. The DLU issued a report recommending that Parkside's variance requests be granted. App. 111a-146a. The County noted that there would be a twenty-year ban on the future transfer of the property to Capano, Vietri or any of their family members and, on this basis, the County was willing to recommend that Parkside's variances be granted. App. 135a-139a. The County further found that "Clearly, without plan approval, there can be no beneficial use of the Property . . . Applicant has been denied substantially all economically viable use of the property through application of the UDC." App. 145a. The BOA granted all of Parkside's variance requests. App. 152a-168a. Again, the County did not demand removing any excess square footage. The Board found that "Given its location in the floodplain, the property loses economic viability for any use without the Board granting a beneficial use appeal." App. 162a.

Concord Pets Food & Supplies, Inc. In Concord Pets Food, the applicant sought a variance from the maximum building square footage of 3,445 square feet to maintain 11,020 square feet of gross floor area at its commercial property and related variances for street yard setbacks, paving setbacks, opacity, landscape surface ratio and minimum lot size. The County approved the square footage variance, representing a differential of approximately 220% beyond that permitted by Code as well as the other related variances. App 147a; A234; B535 at 217. Again, no demands of demolishing or foaming in the excess square footage or barring the property owners from future ownership were made.

Montelone. In Montelone, the record plan called for 2,500 square feet of office space. App. 103a. However, the structure, as built, was 4,832 square feet, a difference of approximately 93% beyond that permitted by the record plan. App. 103a; A151 at 3; B535 at 217. The County granted the variance with respect to the maximum gross floor area ratio, allowed for less than half of the required parking spaces and granted related variances regarding opacity, rear and street yard setbacks and paving setbacks. App. 100a-104a. No demands were made for removal of excess square footage and no one suggested that the owners should have to forfeit their interest in the property.

Other Projects. The County granted 326 Associates, L.P. a variance for reduced parking spaces where the difference between the square footage permitted by the record plan and the square footage constructed was approximately 34%. App. 211a; A002; B535 at 217-218. Likewise, a square-footage differential of approximately 28% beyond that permitted by the Code was allowed in Golden Dove Associates for a restaurant. App. 107a; A212; B535 at 218. Similarly, a 9% height differential between what was constructed and what was permissible by Code was allowed for a Boscov's Department Store. App. 96a, 97a; A142; B535 at 218. In none of these other projects did the County demand removal of excess square footage or ban the owners from future ownership of their property.

II. Procedural History

On July 28, 2003, WH brought suit against the County seeking damages: (1) pursuant to 42 U.S.C. §1983 for violation of WH's right to substantive due process; (2) pursuant to 42 U.S.C. §1983 for violation

of WH's right to equal protection; (3) for inverse condemnation; and (4) for breach of contract. App. 169a-184a.

The County moved to dismiss the Complaint pursuant to Delaware Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted. App. 10a. The Delaware Superior Court granted the County's motion to dismiss the due process and inverse condemnation counts of the Complaint, but denied the motion as to the remaining counts. *Wilmington Hospitality, LLC v. New Castle County*, C.A. No. 03C-07-213MMJ (Del. Super. 2004); App. 1a-15a. The court denied WH's motion for reargument on the dismissal of the inverse condemnation claim. *Wilmington Hospitality, LLC v. New Castle County*, 2004 Del. Super. LEXIS 346 (Del. Super. 2004); App. 16a-19a. The court found that WH had not stated a categorical taking claim because WH ultimately received some debt relief incident to the surrender of the property to its lender. *Id.* at *5. WH moved to amend its complaint to assert that: (a) in the alternative, the county temporarily denied WH all economically viable or beneficial use of the hotel property; and (b) to the extent the County's actions fell short of denying WH all economically viable or beneficial use of the property, the County nonetheless effected a temporary or permanent taking of WH's property without just compensation based upon the economic effect of the County's actions, its interference with WH's reasonable investment-backed expectations and the character of the County's actions. App. 185a-204a. The court denied WH's motion. *Wilmington Hospitality, LLC v. New Castle County*, 2005 Del. Super. LEXIS 189 (Del. Super. 2005) at *9, *10; App. 20a-27a.

On April 26, 2007, the Delaware Superior Court denied the County's motion for summary judgment. *Wilmington Hospitality, LLC v. New Castle County*, 2007 Del. Super. LEXIS 121 (Del. Super. 2007); App. 28a-37a. A jury trial began on June 4, 2007 and ended two weeks later. The County's motion for judgment as a matter of law was denied. On June 18, 2007, the Jury of twelve rendered a verdict in favor of WH on its equal protection claim awarding $7.5 million. The Jury found, by special interrogatory, that: (1) WH identified other similarly situated landowners; (2) the County treated other similarly situated landowners differently; (3) the County intentionally treated WH differently than other similarly situated landowners; and (4) the County had acted irrationally in treating WH differently. App. 207a, 208a. The Jury found in favor of the County on the breach of contract claim. The County renewed its motion for judgment as a matter of law and that motion was denied. *Wilmington Hospitality, LLC v. New Castle County*, 2007 Del. Super. LEXIS 384 (Del. Super. 2007); App. 38a-55a.

The Delaware Supreme Court reversed the trial court's decision upholding the verdict and affirmed the trial court's decisions dismissing WH's due process and inverse condemnation claims and denying WH's motion to amend its complaint to state alternate takings claims. *New Castle County v. Wilmington Hospitality, LLC*, 2008 Del. LEXIS 593 (Del. 2008); App. 56a-68a. The court held that WH's Equal Protection claim failed "at the threshold" because none of the other projects WH offered as comparators were prima facie identical in all relevant respects to WH's project. App. 57a, 62a-67a. It further held that no reasonable jury could find that the County acted arbitrarily or irrationally. App. 68a. Finally, the

Delaware Supreme Court summarily affirmed the lower court's dismissal of WH's due process and inverse condemnation claims on the basis of the trial court's decisions. App. 68a.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW ERRED IN DECIDING THAT A LANDOWNER BRINGING AN EQUAL PROTECTION CLAIM MAY ONLY SATISFY THE REQUIREMENT THAT THE LANDOWNER IDENTIFY SIMILARLY SITUATED LANDOWNERS BY IDENTIFYING LANDOWNERS THAT ARE PRIMA FACIE IDENTICAL.

In *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), this Court explained that a successful equal protection claim may be brought by a "class of one" where "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*

In this case the trial court permitted the jury to hear evidence of seven comparators that WH alleged were similarly situated. As set forth in more detail in the above Statement of the Case, these comparators were commercial property owners that built buildings substantially larger than permitted by the filed record plans or applicable zoning restrictions or both. All of the comparators required variances from the County. Five of the comparators had overbuilt by the same percentage, or more, than WH. One of the comparators was the subsequent owner of the very building that WH lost to foreclosure and required six of nine of the same variances WH sought. App. 69a, 70a, 152a.

The County also presented evidence which it claimed established that the comparators were materially different from WH. The County presented evidence purporting to show that WH was aware that the building it constructed was larger than permitted by the record plan and argued that none of the comparators had purposely overbuilt their buildings. The County further argued that each comparator differed in some material way from WH, because either the number or nature of the variances sought was different.

The trial court instructed the jury on the appropriate standard for evaluating the similarity of the comparators, *i.e.*, that in order to find an equal protection violation, the jury must find that WH identified "similarly situated" landowners and that New Castle County treated those "similarly situated" landowners differently. App. 205a, 206a. The trial court did not instruct the jury to apply the more restrictive "prima facie identical in all material respects" standard.

After considering the evidence and applying the instruction given by the trial court, the jury returned a special interrogatory finding that WH had "identified other similarly situated landowners" and that "New Castle County treated other similarly situated landowners differently." App. 207a.

On appeal, the Delaware Supreme Court overturned the jury's finding of fact on the "similarly situated" issue by applying an unduly restrictive standard for identifying a comparator. The court below held that, in order to meet the threshold test of identifying others similarly situated, the plaintiff must identify others who are "prima facie identical in all relevant respects." *New Castle County v. Wilmington Hospitality, LLC*, 2008 Del. LEXIS 593, *9 (Del. Dec.

22, 2008); App. 62a. The Delaware Supreme Court summarily eliminated all but two of the seven comparators on the basis that only hotels could conceivably be "prima facie identical," and rejected the two hotel owners as comparators because they did not knowingly overbuild, thereby disregarding the jury's "similarly situated" determination. App. 64a, 68a. In so holding, the Delaware Supreme Court invoked the "identicalness" standard espoused in the Seventh Circuit's opinion in *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002), and an Eleventh Circuit decision following *Purze, Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006). In *Purze* the Seventh Circuit, although citing this Court's decision in *Olech* as validating the "class of one" Equal Protection theory, nevertheless did not apply the "similarly situated" standard enunciated in *Olech* but, rather, relied on the Seventh Circuit's own earlier jurisprudence requiring a "class of one" equal protection claimant to establish that comparable individuals are "identically situated in all relevant respects rationally related to the government's mission." *Purze*, 286 F.3d at 455 (*citing Indiana State Teachers Ass'n v. Board of School Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996)). The *Olech* case, although appealed from the Seventh Circuit, did not embrace that Circuit's "identicalness" test but, rather, applied the same "similarly situated" standard to "class of one" Equal Protection claims as this Court does in other Equal Protection cases. This Court has consistently used the "similarly situated" terminology in its equal protection decisions. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 343 (1989) ("similarly situated property owners"); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 366 n. 4 (2001)

("similarly situated in relevant respects"); *Williams v. Vermont*, 472 U.S. 14, 20, 23 (1985) ("similarly situated for all relevant purposes"); *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886)("similarly circumstanced"); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("the equal protection clause directs that 'all persons similarly circumstanced shall be treated alike'"). *Purze* and the cases following it, including the Delaware Supreme Court's decision below, mistakenly applied a circuit court test that predates and was not approved of by this Court in *Olech*. Under the well-established and uniformly applied "similarly situated" standard, a "plaintiff need not allege she was treated differently than others identically situated but rather that she was treated differently from others similarly situated." *Montanye v. Wissahickon School District*, 327 F. Supp. 2d 510, 519 (E.D. Pa. 2004) (emphasis in original); *See also Tapalian v. Tusino*, 377 F. 3d 1, 6 (1st Cir. 2004) ("the test is whether a prudent person, looking objectively at the incidents would think them roughly equivalent and the protagonists similarly situated . . . exact correlation is neither likely nor necessary, but the cases must be fair congeners.").

Whether others are similarly situated is an issue of fact. *Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836, 849 (10th Cir. 2005); *A.B.C. Home Furnishings, Inc. v. Town of East Hampton*, 964 F. Supp. 697, 702 (E.D.N.Y. 1997); *T.S. Haulers, Inc. v. Town of Riverhead*, 190 F.Supp.2d. 455, 463 (E.D.N.Y. 2002); *Herro v. City of Milwaukee*, 817 F. Supp. 768, 772 (E.D.Wis. 1993) (license given to subsequent owner of same property); *Ossler v. Village of Norridge*, 557 F. Supp. 219, 223 (N.D.Ill. 1983) (property rezoned for subsequent owner of same property); *Kirschner v. Zoning Bd. of Appeals of Inc. Village of Valley Stream*, 924 F. Supp. 385, 394 (E.D.N.Y. 1996). WH presented suffi-

cient evidence to the jury to allow it to conclude that the comparators were "similarly situated." The requirement imposed by the Delaware Supreme Court, that a landowner identify properties that are prima facie identical in all relevant respects, effectively prevents landowners from invoking the protections of the Equal Protection Clause. Virtually all real estate can be said to be, in some relevant respect, not prima facie identical. This Court should grant WH's petition to resolve this important constitutional issue.

II. THE COURT BELOW ERRED IN DECIDING THAT A FACTFINDER IN A "CLASS OF ONE" EQUAL PROTECTION CLAIM MAY NOT CONSIDER THE OVERALL TREATMENT AFFORDED A LANDOWNING PLAINTIFF IN DETERMINING WHETHER THE GOVERNMENT'S ACTIONS ARE IRRATIONAL OR ARBITRARY.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), Del Monte Dunes, a developer, brought suit under 42 U.S.C. §1983 alleging an unconstitutional regulatory taking based on the theory that the city's actions demonstrated that it would not permit development of Del Monte's property under any circumstances. *Id.* at 698. While conceding the legitimacy of the City's stated regulatory purposes, Del Monte emphasized the tortuous and protracted history of attempts to develop the property, as well as the shifting positions taken by the City throughout the process, and argued that it had been treated in an unfair and irrational manner. *Id.* at 699. On appeal from a jury verdict in favor of Del Monte, the City argued that the issue of whether the City's decision to reject Del Monte's plan bore a

reasonable relationship to its proffered justifications should not have been submitted to the jury. This Court rejected the City's argument finding that the case was properly submitted to the jury. *Id* at 721.

In this case, as in *Del Monte Dunes*, WH's challenge was premised on unreasonable governmental action; not simply the County Board of Adjustment's denial of WH's variance requests, but on the totality of the County's actions aimed at WH. The Delaware Supreme Court found that because the *Board* concluded that WH had intentionally overbuilt the hotel, *it* had a rational basis for denying WH's variance requests. App. 68a. The court never stated that the Board's finding provided a rational basis for the behavior of the County's Land Use Department and Executive Branch toward WH. The court summarily concluded that the conduct of those County departments before and after the Board's decision could not have been the basis for a jury finding that the County acted in an arbitrary or irrational manner because "WH never attempted to show that the County had been more generous with other developers who knowingly overbuilt and were denied variances." App. 68a. The Delaware Supreme Court thereby improperly conflated the "similarly situated" and "rational basis" prongs of the Equal Protection analysis and, contrary to *Del Monte Dunes*, precluded the jury's consideration of all the County's conduct demonstrating that it would not permit WH to develop its property under any circumstances.

The jury heard testimony from County employees that the County Executive had made it clear that so long as he was there, the County would never allow WH to open the hotel. B409 at 79. The County Executive considered it a "victory" when WH was driven

into bankruptcy. B416 at 107. The jury heard evidence that each time WH took steps to meet the County's conditions to open or sell the hotel, the County changed its position. For example, the jury had the benefit of a letter, and accompanying extensive list, from the County Attorney identifying the items WH needed to address to obtain temporary and permanent certificates of occupancy. A105. The jury then heard evidence that as WH began completing the items on the list and so updated the County, the County wrote back saying that its earlier letter "has no efficacy," and a County employee testified that the temporary certificate of occupancy had been "taken off the table." A145; B519 at 45-47; B520 at 50-51; B456 at 87-88; B435-436 at 208, 209. The jury also heard evidence of conditions never before or since imposed on any similarly situated landowner in the County, including the twenty-year ban on ownership of the property by WH, its principals and their family members. App. B405-407 at 30-37; B416 at 106-107; B501 at 190-191; B416 at 106-107; B517 at 26.

In this case, like *Del Monte Dunes*, the trial court properly allowed the jury to consider all the evidence of the protracted history of the project and to determine the hotly contested factual issues related to the County's overall treatment of WH as compared with similarly situated landowners. The rationale set forth in *Del Monte Dunes* should apply with equal force to a "class of one" equal protection claim. This Court should grant WH's petition to clarify that in a "class of one" equal protection case brought in the land use context, the issue of whether government actions are irrational or arbitrary may be determined by the factfinder in light of the overall treatment afforded the landowning plaintiff.

III. THE COURT BELOW ERRED IN DECIDING THAT A LANDOWNER DID NOT STATE A CLAIM FOR INVERSE CONDEMNATION WHERE THE LANDOWNER ALLEGED THAT THE DEFENDANT COUNTY PROHIBITED THE LANDOWNER, ITS PRINCIPALS AND ANY PERSON RELATED TO THE PRINCIPALS FROM OWNING THE SUBJECT PROPERTY FOR TWENTY YEARS.

In its Complaint, WH alleged that: (1) the County required that WH, its principals and anyone related to them be prohibited from having any ownership interest in the hotel property for a period of twenty years (App.176a at ¶39; 173a at ¶25; 177a at ¶43); (2) the County would not allow WH to open or operate the hotel within the square footage limitations on the Record Plan and made it clear that the hotel would never open unless WH and its principals forfeited their ownership interests (App.173a at ¶25); (3) when WH tried to sell the property, the County maliciously upended the transaction (App. 179a at ¶53); and (4) the County denied WH all economically viable use of the hotel property (App. 182a at ¶65). Based on WH's concession that it received debt relief incident to the Bank's taking title to the property, the trial court found that WH could not maintain its claim that it was deprived of all economically viable use of the property. App. 19a.

WH moved to amend its Complaint to assert, in the alternative, that: (a) the County temporarily denied WH all economically viable use of the property; and (b) to the extent the County's actions fell short of denying WH all economically viable use of the property, the County nonetheless effected a temporary or per-

manent taking of WH's property without just compensation based upon application of the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). App. 186a, 202a. Under the *Penn Central* test,

> where regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending upon a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

Here, as to reasonable investment-backed expectations, WH alleged that it invested over $23 million to construct the hotel in good-faith reliance on the Building Permit issued by the County for the construction of the hotel as indicated on its architect's drawings. App.192a at ¶21. The economic effect of the County's actions was that WH was driven into bankruptcy, lost its entire investment in the property and lost title to the property. App. 197a at ¶45; 199a at ¶54; 200a at ¶59; 202a at ¶70. With respect to the character of the government action, WH alleged the County banned WH, its principals and any person related to the principals from owning the property for a period of twenty years. App. 193a at ¶25; 196a at ¶39; 197a at ¶43.

The trial court denied WH's motion to amend, finding that WH did not have a "compensable property interest" in the "excess square footage." App. 26a. The Delaware Supreme Court affirmed on the

basis of the trial court's decision. App. 68a. Focusing solely on any interest WH may have had in the excess square footage, the court below overlooked WH's fundamental constitutionally protected rights to own, use, enjoy and sell the property, as well as the right of WH and its principals to transfer or devise the property to others. This Court recognized long ago, "the constitutional provision [Taking Clause] is addressed to every sort of interest the citizen may possess." *United States v. General Motors Corp.* 323 U.S. 373, 378 (1945). Furthermore, as Justice O'Connor observed in *Palazzolo*, "the [Rhode Island Supreme] court erred in elevating what it believed to be 'petitioner's lack of reasonable investment-backed expectations' to 'dispositive' status. Investment-backed expectations, though important, are not talismanic under *Penn Central*." *Palazzolo*, 533 U.S. at 618. Similarly, this Court found a taking in *Hodel v. Irving*, 481 U.S. 704, 715 (1987), notwithstanding the fact that "[t]he extent to which any of appellees' decedents had 'investment-backed expectations' in passing on the property is dubious."

The character of the government's actions here was extraordinary and unprecedented. The County had no legal authority whatsoever to ban WH, its principals or the relatives of WH's principals from owning the property. To put it simply, the abrogation of such a fundamental property right "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). As in *Hodel*, "the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times . . . Even the United States concedes that total

abrogation of the right to pass property is unprecedented and likely unconstitutional." *Hodel v. Irving*, 481 U.S. at 716.

The County's ownership ban did not resemble any legitimate land use planning device. The court below erred in upholding the trial court's denial of WH's motion to amend its Complaint to include takings claims since WH did state claims meeting notice pleading standards. This Court should grant WH's petition to address the important constitutional issue of whether the government's ownership ban constitutes a regulatory taking.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 20, 2009

APPENDIX

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

WILMINGTON HOSPITALITY, LLC,
a Delaware limited liability company,
Plaintiff,

v.

NEW CASTLE COUNTY, a political subdivision of the State of Delaware,
Defendant.

Submitted: May 14, 2004
Decided: August 4, 2004

MEMORANDUM OPINION

Upon Defendant's Motion to Dismiss Wilmington Hospitality, LLC's Complaint

GRANTED IN PART
DENIED IN PART

Adam Balick, Esquire, Balick & Balick, Wilmington, Delaware; John J. Yannacone (argued), Yannacone & Baldo, Attorneys for Plaintiff

Peter J. Walsh, Jr., Esquire, John M. Seaman, Esquire, Potter Anderson & Corroon 1.1,P, Wilmington, Delaware; Hamilton P. FOX, III, Esquire (argued), Gail Westover, Esquire, Sutherland Asbill & Brennan LLP, Washington, DC, Attorneys for Defendant

FACTUAL AND PROCEDURAL CONTEXT

Wilmington Hospitality, LLC ("WH") filed this action on July 28, 2003 against New Castle County

("NCC"). The Complaint contains four counts demanding damages and declaratory relief: (1) pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights; (2) pursuant to 42 U.S.C. 1983 for deprivation of property without equal protection; (3) inverse condemnation; and (4) breach of contractual obligation to issue a temporary certificate of occupancy.

NCC has moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Alternatively, if the Court declines to dismiss WH's Section 1983 and inverse condemnation claims, NCC requests that the Court condition WH's right to proceed in this case on payment of NCC's costs and attorneys' fees in the pending Court of Chancery action filed in the year 2000.

For purposes of evaluating Defendant's Motion to Dismiss, the following facts are undisputed. WH is the former owner of a hotel located alongside Airport Road and I-95 in New Castle County. The principals of WH are Joseph L. Capano ("Capano") and Albert Vietri ("Vietri"). WH's predecessor submitted a Preliminary Plan to NCC for construction of a 118,805 square feet hotel. NCC approved the final Record Plan on April 11,1990. The original architectural firm designed a 156,000 square feet hotel—38,000 square feet larger than the authorized Record Plan. Construction then was delayed for almost 8 years.

Following a dispute with the original firm, a second architectural firm was hired. The second firm completed the necessary drawings and filed an application for a building permit on June 5, 1998. NCC reviewed the application and issued a building permit on July 21, 1998 for a 155,480 square feet hotel.

WH invested approximately $25,000,000 to construct the hotel. On May 12, 2000, WH requested an inspection for a certificate of occupancy. NCC Department of Land Use employees visited the site. NCC found that the hotel did not conform to the Record Plan because construction exceeded the Plan by 38,000 square feet. NCC denied the request for a certificate of occupancy.

WH then applied to the NCC Board of Adjustment ("Board") for nine zoning variances that would allow the hotel to open, including: (1) increasing the maximum floor area ratio to allow use of the building as constructed; (2) allowing encroachment onto the flood plain of approximately 4,000 square feet; and (3) reducing the number of required parking spaces from 325 to 202.

The Board conducted hearings on the requested variances on July 13 and 26, 2000, The Board reviewed documents and heard testimony from representatives of WH, the architects, and the project engineer. On July 27, 2000, the Board denied the variance requests. WH appealed the board's decision to this Court.

On August 22, 2000, WH asked for permission to open part of the hotel consisting of 102,120 square feet. NCC responded that it would issue a certificate of occupancy if WH removed the top two floors or otherwise rendered unusable the space in excess of the Record Plan. NCC further advised WH that it would permit partial opening of the hotel, without the necessity of removing or disabling the top two floors, provided that Capano and Vieth and their relatives did not have any interest in the hotel for a period of 20 years. WH has alleged that the conditions proposed by NCC "would clearly destroy

the value of the project and be so expensive and take so long to accomplish that WH would be forced out of business and destroyed."[1] On October 14, 2000, NCC denied WH's renewed request for a certificate of occupancy.

On October 20, 2000, WH filed a complaint in the Court of Chancery, seeking to compel NCC to issue a certificate of occupancy. The presiding Vice Chancellor was appointed acting Superior Court Judge to hear appeals from the Board of License, Inspection and Review and from the Board of Adjustment. The Court of Chancery denied WH's motions for a temporary restraining order and for a preliminary injunction. Trial was set for November 28, 2004. The day before trial, WH notified the Court of Chancery that it was not ready to proceed. Trial was postponed indefinitely and that case remains pending.

WH's lender instituted foreclosure proceedings in this Court on December 26, 2000. WH filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on June 29, 2001. All Delaware state court matters were automatically stayed.

On September 25, 2001, a meeting was held among NCC, WH, counsel for WH, and a prospective purchaser of the hotel. The parties vehemently disagree as to what transpired during the meeting. WH contends that NCC agreed to issue a temporary certificate of occupancy if WH complied with the terms of a letter from NCC dated February 2, 2001. By letter dated November 1, 2001, WH's attorney referred to the February 2, 2001 letter as a "commitment." By letter dated November 2, 2001, NCC took the position that the February 2nd letter

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[1] Complaint ¶ 41.

contained a useful listing of outstanding building code issues, but that NCC would not issue a certificate of occupancy until the construction was in full compliance with all applicable laws.

On November 2, 2001, WH executed a contract to sell the hotel to a company whose principals were not related to or affiliated with WH or its principals. The agreement of sale was approved by the bankruptcy court. WH was required to obtain a certificate of occupancy in order to close the transaction.

WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, "was done with the intent to undermine and interfere with WH's bankruptcy."[2] WH also entered into a settlement agreement with its lender. The agreement would have permitted WH to satisfy its outstanding obligations to the lender at a discount of approximately $1,500,000. Thus, WH asserts that NCC's breach of the agreement reached during the meeting was a "malicious" attempt to prevent WH from selling the property and thereby recouping some of its financial losses.[3]

On November 30, 2001, WH brought yet another action in the United States District Court for the Eastern District of Pennsylvania, alleging that the November 2, 2001 letter from NCC breached the agreement to issue a temporary certificate of occupancy. The District Court referred the question of application of the bankruptcy abstention doctrine. The United States Bankruptcy Court for the Eastern District of Pennsylvania recommended abstention.

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[2] Complaint ¶ 48.

[3] Complaint ¶ 53.

The District Court then granted NCC's motion to dismiss the District Court action.

DECISION OF NCC BOARD OF ADJUSTMENT JULY 27, 2000

The Board of Adjustment may grant dimensional variances from County zoning requirements if the Board finds that the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code. WH applied for nine variances. The two main issues considered by the Board were: (1) whether WH's application demonstrated exceptional practical difficulties; and (2) whether NCC's conduct invoked the doctrine of equitable estoppel. The Board voted to deny the requested variances.[4]

Exceptional Practical Difficulty Test

In evaluating WH's application for area variance, the Board considered the factors established by the Delaware Supreme Court in *Board of Adjustment of New Castle County v. Kwik-Check*.[5] One of these

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[4] In conclusion, the Board votes to deny the requested variances. The requested dimensional changes are not minimal and the harm to the applicant if the variances are denied would not be greater than the probable effect on neighoring properties, and the community at large, if the variances are granted. The granting of these variances would cause substantial detriment to the public good, and would substantially impair the intent and purpose of the zoning code. Board of Adjustment Decision, p. 12.

[5] 389 A.2d 1289 (Del. 1978) ((1) the nature of the zone in which the property lies; (2) the character of the immediate vicinity and the uses contained therein; (3) whether, if the restriction upon the applicant's property was removed, such removal would seriously affect such neighboring property and

factors is whether if the variance is denied, the restriction would create "exceptional practical difficulty" tor WH to make permitted use of the property.[6] The Board found that the "exceptional practical difficulty" asserted by WH was a self-created hardship.[7]

The Board's analysis of the testimonial and documentary evidence was that there was nothing inherent in the property that prevented WH from complying with the zoning code.

> Mr. Capano has repeatedly acknowledged that the need for the requested variances arose because of his failure to adhere to the restrictions contained on the record plan. Moreover, the witnesses who testified on his behalf acknowledged that there was no restriction inherent in the land that would have prevented him from building the structure depicted on the record plan (i.e. 118,805 square feet). Thus, the only reason the need for the variances arose was due to the fact that the applicant built his building 39,000 square feet larger than permitted by the record plan, which, in turn, requires proportional compliance with the Unified Development Code.

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uses; and (4) whether, if the restriction is not removed, the restriction would create an unnecessary hardship on exceptional practical difficulty for the owner in relation to his efforts to make normal improvements on the character of that use of the property which is a permitted use under the use provisions of the ordinance.)

[6] *Id.* at 1291.

[7] WH's application is not for a use zoning variance. If it were, the self-created hardship doctrine could act as a complete bar. *See Dexter v. New Castle County Board of Adjustment*, Del. Super., C.A. No. 96A-03-033, Toliver, J. (Sept. 17, 1996).

> To approve the variances under these circumstances would, as the Court in Weaver feared, do nothing more than encourage builders to ignore the County's zoning restrictions, safe in the knowledge that the Board of Adjustment would be their relief valve. In this matter, the extent of the self-created hardship is such that the Board cannot retroactively sanction the significant violations of the zoning code that have occurred. In so doing, the Board does not ignore the significant financial investment that has been made in this case. To assert, however, the size of the investment as justification for the award of a valiance equates with trying to "buy" a variance. If this were sufficient, in and of itself, to meet the economic hardship factor discussed in Kwik-Check, it would again encourage substantial investment in projects that do riot adhere to the restrictions in the zoning code on the basis that the investment could guarantee a variance.[8]

Equitable Estoppel Analysis

The Board considered the equitable estoppel standards established in *Miller v. Board of Adjustment*.[9] The party asserting the defense of equitable estoppel against enforcement of a zoning regulation must demonstrate that the party, acting in good faith, made expensive and permanent improvements in reliance on affirmative acts of a municipal corporation, and that the equities strongly favor the party asserting equitable estoppel.[10]

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[8] Board of Adjustment Decision, p. 11.

[9] 521 A.2(1 642 (Del. Super. 1986).

[10] *Id*. at 645-46.

The Board heard extensive testimony and reviewed documentary evidence. The Board concluded:

> The biggest stumbling block in this case for the applicant is the good faith aspect of this analysis. It was very apparent to the Board from the outset that the developer had no intention of adhering to the square footage limitations contained on the record plan. The developer acknowledged that he had to have been aware of the square footage limitations at some point, however, this limitation never factored into his considerations for the project. The record is replete with evidence to indicate that the developer (or his agents) was repeatedly given the opportunity to discover the discrepancy between the record plan and the proposed building size. Many of these opportunities occurred prior to the time construction commenced when, by the developer's own admission, it would have been much less expensive to bring the building into compliance. Moreover, there was evidence submitted to suggest that the developer was aware of the discrepancy and took affirmative steps to conceal the discrepancy from third parties. In particular, Artesian Water letters (with the changed square footage numbers) and the representation in the HVS appraisal that the developer had communicated to it that, despite the record plan's square footage limitation of 118,805, the "correct figure" was 156,000 square feet, are illustrative of this point. Both of these representations occurred prior to the time construction commenced and would lend credence to

the argument that the developer was not acting in good faith.[11]

ANALYSIS

NCC has moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted. For purposes of a motion to dismiss for failure to state a claim, aU allegations in the complaint must be accepted as true. If plaintiff may recover under any reasonably conceivable set of circumstances, the motion to dismiss under Rule 12(b)(6) must be denied.[12]

The Complaint contains four counts demanding damages and declaratory relief: (1) pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights; (2) pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection; (3) inverse condemnation; and (4) breach of contractual obligation to issue a temporary certificate of occupancy.

Section 1983 Due Process

WH has failed to state a cause of action under 42 U.S.C. § 1983 based upon deprivation of due process rights. The evidence presented to the Court in the course of this Motion demonstrates that WH constructed a hotel at least 38,000 square feet larger than the hotel approved in the Record Plan, WH sought relief according to the procedures established in zoning variance applications. WH was not limited in its ability to present testimony and evidence to the Board. In the statutorily-granted exercise of its discretion, the Board denied WH's requests for

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[11] Board of Adjustment Decision, p. 9.

[12] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

variances, WH has failed to present any facts that could lead to the conclusion that WH was denied due process.

Inverse Condemnation

It is undisputed that WH now has sold the property at issue to a third party. In order to sustain a claim for inverse condemnation, WH must show that it has been deprived by NCC of *all economic value* of the property by NCC's zoning regulations.[13] Even assuming for purposes of this decision that NCC's actions prevented WH from ever opening the hotel, the property *a fortiori* retained some economic value as clearly evidenced by the recent sale. This is not a case in which a governmental entity has capriciously deprived an individual of the ability to utilize land in a manner that presents irreparable harm to the individual. The principals of WH are sophisticated developers. The property was developed for commercial use. Accepting as true WH's claims of severe financial loses, the property still retained some economic value. Therefore, WH has failed to state a claim for inverse condemnation based upon zoning regulation.

Section 1983 Equal Protection

WH's claim pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection relies on the factual allegation that WH has been treated differently by NCC than others similarly situated. WH bolsters this argument with the fact

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[13] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In contrast, a claim of inverse condemnation based upon physical seizure by a governmental entity need not allege denial of all economically viable use of the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

that NCC advised WH that NCC would permit partial opening of the hotel, without the necessity of removing or disabling the top two floors, provided that Capano and Vietri and their relatives did not have any interest in the hotel for a period of 20 years.

During oral argument on the Motion, counsel for WH was asked by the Court whether it could provide the identity of similarly situated landowners or developers who received different treatment by NCC. WH informed the Court that additional discovery would be needed to obtain that information. At this stage in the proceedings, it is appropriate to permit additional discovery on this claim. Such discovery shall be limited to the identity of similarly situated land owners and their dealings with NCC and the Board in the context of seeking area variances for property constructed not in accordance with the terms of an approved record plan.

Breach of Contract

WH has asserted that during the meeting held on September 25, 2001, NCC entered into an agreement to issue a temporary certificate of occupancy if WH complied with the terms of a letter from NCC dated February 2, 2001. NCC subsequently referred to the February 2, 2001 letter as a "commitment" Shortly thereafter, NCC described the letter as a useful listing of outstanding building code issues. NCC takes the position that no contract was made during the September 25, 2001 meeting, thus NCC would not issue a certificate of occupancy until the construction was in full compliance with all applicable laws. WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, was done with the intent to

undermine and interfere with WH's ability to sell the property, resulting in monetary damages.

Accepting the breach of contract allegations in the complaint as true, the complaint presents a reasonably conceivable set of circumstances under which WH may recover for breach of contract. Therefore, the parties may proceed with discovery directly relating to the events that occurred during the September 25, 2001 meeting.

Other Pending Actions

NCC has requested that the Court condition WH's right to proceed in this case on payment of NCC's costs and attorneys' fees in the pending Court of Chancery action filed in the year 2000. This Court is without authority to award attorneys' fees in connection with an action pending in another court under these circumstances. The Court declines to interfere with the Court of Chancery's discretion to assess whether an award of attorneys' fees is appropriate and to determine the reasonableness of any requested fees.

WH has declined to pursue either the action filed in this Court to appeal the Board's decision, or the litigation initiated in the Court of Chancery. It is well-settled that all claims arising from a common nucleus of operative facts ought to be brought in the same court at the same time, whenever possible.[14] WH's claims involve the same common nucleus of operative facts in both the pending Chancery Court action and the appeal of the Board of Adjustment report still open in this Court.

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[14] *Deriger v. Tallman*, 773 A.2d 1005, 1017 (Del. Ch. 2000).

Because the Superior Court has jurisdiction to hear the claims remaining in this action, I do not intend to burden the Court of Chancery by directing WIT to exhaust its requests for relief in that Court before proceeding with this action. In the interest of judicial economy, however, WH is instructed to elect either: (1) to provide a draft order for consolidation of this action with its appeal of the report of the Board of Adjustment; or (2) to provide a draft order dismissing that appeal, with prejudice.

CONCLUSION

WH has failed to state a cause of action under 42 U.S.C. § 1983 based upon deprivation of due process rights. Therefore, NCC's Motion to Dismiss Count 1 of the Complaint is hereby GRANTED.

Even accepting as true WH's factual allegations regarding its claim for inverse condemnation, WH has failed to state a cause of action. Therefore, NCC's Motion to Dismiss Count 3 of the Complaint is hereby GRANTED.

Accepting as true the allegations set forth in WH's claim for relief pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection, WH has stated a cause of action. Therefore, NCC's Motion to Dismiss Count 2 of the Complaint is hereby DENIED. The parties may conduct additional discovery on this claim, limited to the identity of similarly situated land owners, and to their dealings with NCC and the Board in the context of seeking area variances for property constructed not in accordance with the terms of an approved record plan.

Accepting the breach of contract allegations in the Complaint as true, WH has presented a reasonably conceivable set of circumstances under which WH

may recover. Therefore, NCC's Motion to Dismiss Count 4 of the Complaint is hereby DENIED. The parties may proceed with discovery limited to the events that occurred during the September 25, 2001 meeting.

WH's right to proceed in this case is not conditioned on payment of NCC's costs and attorneys' fees in the pending Court of Chancery action filed in the year 2000.

IT IS SO ORDERED.

/s/ Mary M. Johnston
MARY M. JOHNSTON
The Honorable Mary M. Johnston

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C. A. No. 03C-07-213 MMJ

WILMINGTON HOSPITALITY, LLC,
a Delaware limited liability company,
Plaintiff,

v.

NEW CASTLE COUNTY, a political subdivision of the State of Delaware,
Defendant.

ORDER

Upon Plaintiff's Motion for Reargument
DENIED

1. By Memorandum Opinion dated August 4, 2004, the Court considered Defendant's Motion to Dismiss. The Court dismissed Counts 1 and 3 of the Complaint. Counts 2 and 4 were retained and the Court outlined certain limited discovery that would be permitted with regard to the remaining counts. Defendant filed a Motion for Reargument of the Court's decision.

2. The purpose reargument is to permit reconsideration of findings of fact, conclusions of law, or judgments of law.[1] Reargument usually will be denied unless the moving party demonstrates that the Court overlooked a precedent or legal principle that would have a controlling effect, or that it

[1] *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).

misapprehended the law or the facts in a manner affecting the outcome of the decision. "A motion for reargument should not be used merely to rehash the arguments already decided by the court."[2]

3. During oral argument on September 9, 2004, Defendant, Plaintiff and the Court agreed that the Court erroneously stated a fact in the August 4' Opinion. The Court stated: "It is undisputed that [Plaintiff] now has sold the property at issue to a third party." In fact, Plaintiff did not sell the property to a third party. Plaintiff executed a contract to sell the property. The agreement of sale was approved by the bankruptcy court. Plaintiff's lender subsequently took title to the property and sold it to a third party. Plaintiff conceded that Plaintiff received debt relief as a result of the lender's taking of title to the property.

4. Plaintiff argues that this factual misapprehension affects the outcome of the decision. The Court held: "In order to sustain a claim for inverse condemnation, [Plaintiff] must show that it has been deprived by [Defendant] of *all economic value* of the property by [Defendant's] zoning regulations. Even assuming for purposes of this decision that [Defendant's] actions prevented [Plaintiff] from ever opening the hotel, the property *a fortiori* retained some economic value as clearly evidenced by the recent sale." Whether Plaintiff sold the property or received the economic benefit of debt relief does not affect the Court's ruling. Plaintiff was not deprived of

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[2] *Wilmington Trust Co, v. Nix*, Del, Super., 2002 WL 356371, Witham, J. (Feb. 21, 2002); *Whitsett v. Capital School District*, Del. Super., C.A. No. 97C-04-032, Vaughn, J. (Jan. 28, 1999); *Monsanto Co. v. Aetna Casualty & Surety Co.*, Del. Super., C.A. No. 88-JA-118, Ridgeley, P.J. (Jan. 14, 1994).

all economic value because it was relieved of a portion of a substantial financial obligation.

5. Plaintiff further asserts that the Court misapprehended the law by finding that Plaintiff must demonstrate denial of all economically viable use of the property. Therefore, the case should not be dismissed. Instead, Plaintiff should be given the opportunity to present evidence to a finder of fact on the issue of the economic effect of Defendant's actions upon Plaintiff. This argument was made by Plaintiff in support of its Motion to Dismiss. The Court previously considered *Palazzolo v. Rhode Island*[3], in which the United States Supreme Court held: "[A] regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. . . . Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[4]

6. As a matter of law, Plaintiff has failed to show the existence of a regulatory taking sufficient to require an evidentiary hearing for the purpose of consideration of the *Penn Central* factors. Plaintiff's cause of action is based upon the theory of a categorical or complete regulatory taking. In its Complaint, Plaintiff alleges that Defendant denied

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[3] 533 U.S. 606 (2001).

[4] *Id.* at 617 (*citing Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

Plaintiff *"all economically viable use of the hotel property."* The law is clear that a categorical taking only occurs when there has been a complete elimination of value or a total loss.[5] Plaintiff has conceded that to the extent it received debt relief when it surrendered the property, it received some financial benefit.

7. Defendant has failed to demonstrate that the Court overlooked a precedent or legal principle that would have a controlling effect, or that it misapprehended the law or the facts in a manner affecting the outcome of the decision.

THEREFORE, the Defendant's Motion for Reargument is hereby DENIED this 4th day of October, 2004.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston

cc: Prothonotary

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[5] *Tahoe-Sierra preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002) (diminution in value of 95% not categorical taking); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Appolo Fuels, Inc. v. United States*, No. 03-5088 (Fed. Cir. Aug. 30, 2004).

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 03C-07-213 MMJ

WILMINGTON HOSPITALITY, LLC,
a Delaware limited liability company,
Plaintiff,

v.

NEW CASTLE COUNTY, a political subdivision of the State of Delaware,
Defendant.

Submitted: March 10, 2005
Decided: May 24, 2005

MEMORANDUM OPINION

Upon Plaintiff's Motion to Amend Complaint
DENIED

Adam Balick, Esquire, Balick & Balick, Wilmington, DE, John J. Yannacone, Yannacone & Baldo, Media, PA, Attorneys for Plaintiff

Peter *J.* Walsh, Jr., Esquire, Erica L. Niezgoda, Esquire, Potter, Anderson & Corroon, LLP, Wilmington, DE, Hamilton P. Fox, III, Esquire, Gail L. Westover, Esquire, Sutherland, Asbill & Brennan, LLP, Washington, DC, Attorneys for Defendant

Procedural and Factual Context

Wilmington Hospitality, LLC ("WH") filed this action on July 28, 2003 against New Castle County ("NCC"). WH is the former owner of a hotel located

alongside Airport Road and 1-95 in New Castle County. WH's predecessor submitted a Preliminary Plan to NCC for construction of a hotel consisting of 118,805 square feet. NCC approved the final Record Plan on April 11, 1990. An application for a building permit was filed on June 5, 1998. NCC reviewed the application and issued a building permit on July 21, 1998 for a hotel consisting of 155,480 square feet.

WH invested approximately $25,000,000 to construct the hotel. On May 12, 2000, WH requested an inspection for a certificate of occupancy. NCC Department of Land Use employees visited the site. NCC found that the hotel did not conform to the Record Plan because construction exceeded the Plan by 38,000 square feet. NCC denied the request for a certificate of occupancy.

WH then applied to the NCC Board of Adjustment ("Board") for nine zoning variances that would allow the hotel to open, including: (1) increasing the maximum floor area ratio to allow use of the building as constructed; (2) allowing encroachment onto the flood plain of approximately 4,000 square feet; and (3) reducing the number of required parking spaces from 325 to 202.

The Board conducted hearings on the requested variances on July 13 and 26, 2000. On July 27, 2000, the Board denied the variance requests. WH appealed the Board's decision to this Court.[1] On August

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[1] In the August 4, 2004 Memorandum Opinion, this Court instructed WH "to elect either: (1) to provide a draft order for consolidation of this action with its appeal of the report of the Board of Adjustment; or (2) to provide a draft order dismissing that appeal, with prejudice." As of this date, WH has failed to make the election directed by the Court.

22, 2000, WH asked for permission to open part of the hotel consisting of 102,120 square feet. On October 14, 2000, NCC denied WH's renewed request for a certificate of occupancy.

WH's lender instituted foreclosure proceedings in this Court on December 26, 2000. WH filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on June 29, 2001. All Delaware state court matters were automatically stayed.

On November 2, 2001, WH executed a contract to sell the hotel. The agreement of sale was approved by the bankruptcy court. Plaintiff's lender subsequently took title to the property and sold it to a third party. Plaintiff received debt relief as a result of the lender's taking title to the property.

WH filed this action on July 28, 2003. The Complaint contained four counts demanding damages and declaratory relief: (1) pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights; (2) pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection; (3) inverse condemnation; and (4) breach of contractual obligation to issue a temporary certificate of occupancy. NCC moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

By Memorandum Opinion dated August 4, 2004, the Court denied the motion to dismiss as to Count II (claim for relief pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection) and Count IV (breach of contract). The Court dismissed Count I (claim under 42 U.S.C. § 1983 based upon deprivation of due process rights) and Count 3 (in-

verse condemnation). WH filed a Motion for Reargument, which was denied by Order dated October 4, 2004.

WH now has filed a Motion to Amend Complaint. WH seeks to amend the complaint to assert alternative theories of recovery. Specifically, WH claims that: (a) in the alternative, NCC temporarily denied WH all economically viable or beneficial use of the hotel property; and (b) in the alternative, to the extent NCC's actions fell short of denying WH all economically viable or beneficial use of the hotel property, NCC nonetheless effected a temporary or permanent taking of WH's property without just compensation based upon the economic effect of NCC's actions by interfering with WH's reasonable investment-backed expectations and the character of NCC's actions.

Analysis

In dismissing Count 3 of the complaint (inverse condemnation), the Court found:

> It is undisputed that WH now has sold the property at issue to a third party. In order to sustain a claim for inverse condemnation, WH must show that it has been deprived by NCC of *all economic value* of the property by NCC's zoning regulations.[2] Even assuming for purposes of this decision that NCC's actions prevented WH from ever opening the hotel, the property *a fortiori* retained some economic value as clearly

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[2] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In contrast, a claim of inverse condemnation based upon physical *seizure* by a governmental entity need not allege denial of *all* economically viable use of the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

> evidenced by the recent sale. This is not a case in which a governmental entity has capriciously deprived an individual of the ability to utilize land in a manner that presents irreparable harm to the individual. The principals of WH are sophisticated developers. The property was developed for commercial use. Accepting as true WH's claims of severe financial loses, the property still retained some economic value. Therefore, WH has failed to state a claim for inverse condemnation based upon zoning regulation.

WH now seeks to assert the alternative theories of recovery of a temporary denial of all economically viable or beneficial use, and a temporary or permanent taking based upon NCC's interference with WH's reasonable investment-backed expectations and the character of NCC's actions.

The Court generally will grant an amendment to a complaint unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant. In addition, amendment will be denied if the claims sought to be added are futile.[3] Because the Court finds the issue of futility to be dispositive, this opinion will not address any conduct or motive on the part of WH.

In order for WH to demonstrate *prima facie* viability of the proposed claims for relief, WH first must assert facts supporting a reasonable investment-backed expectation in the property taken. The government actions at issue are: (1) NCC's initial denial of WH's request for a certificate of occupancy on the basis that construction by WH exceeded the Record

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[3] *Catamaran Acquisition Corp. v. Spherion Corp.*, 2001 WL 755387, at *3 (Del. Super.).

Plan by 38,000 square feet; (2) the NCC Board of Adjustment's denial of WH's request for nine zoning variances that would allow the hotel to open; and (c) NCC's denial of WH's renewed request for a certificate of occupancy for a portion of the hotel consisting of 102,120 square feet.

For purposes of WH's motion to amend its complaint, the issue is whether, as a matter of law, WE has stated any facts supporting its claim of a cognizable property interest taken by the actions of NCC.[4] All real estate property interests are cognizable under the Fifth Amendment.[5] Although there was no physical taking by NCC in this case, the question is whether NCC's regulatory actions constitute compensable interference with WH's property rights.[6]

The Court already has ruled that because WH was not deprived of all economically viable use, NCC's actions cannot be deemed a categorical taking.[7] Because WH has not suffered a 100% diminution in value, the legal sufficiency of WH's taking claims will be analyzed under the factors established by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York.*[8] To determine whether there has been a temporary or partial

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[4] *Wyatt v. United Stares*, 271 F.3d 1090, 1096 (Fed. Cir: 2001), *cert. denied*, 535 U.S. 1077 (2002).

[5] *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

[6] *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002).

[7] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992).

[8] 438 U.S. 104 (1978).

regulatory taking, the factors are: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[9]

WH has failed to set forth any facts, disputed or otherwise, that present a *prima facie* case that WH had any legitimate investment-backed expectations of economic benefit from construction of a hotel exceeding the Record Plan by 38,000 square feet. WH's reasonable expectation was a property interest in a hotel not to exceed 118,805 square feet. For purposes of application of the *Penn Central* factors, WH did not have a compensable property interest in the 38,000 excess square footage.

The character of NCC's actions is denial of zoning variances and a building permit. NCC's decisions not to act, rather than any affirmative actions, are the root of WH's claims. NCC did not enact new regulations that would interfere with WH's property interests *ex post facto*. Instead, WH's principals, who are without dispute experienced and sophisticated commercial real estate investors and developers, built a hotel that they knew or should have known would not be in compliance with zoning regulations in place at that time.

In short, the character of NCC's actions does not necessitate a finding that, as a matter of law, NCC has engaged in a regulatory taking of WH's property interests, whether partial or temporary. WH has failed to present a *prima facie* case that it had any distinct investment-backed expectation of economic benefit from construction of a hotel exceeding the

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[9] *Id.* at 124.

Record Plan by 38,000 square feet. For purposes of reviewing this case in light of the *Penn Central* factors, any adverse economic impact suffered by WH is not the result of a regulatory taking by NCC.

WH's claims for damages are more properly pursued through the remaining causes of action, pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection, and breach of contract.

THEREFORE, Plaintiff's Motion to Amend Complaint is hereby DENIED.

IT IS SO ORDERED.

/s/ Mary M. Johnston
MARY M. JOHNSTON
The Honorable Mary M. Johnston

cc: Prothonotary—Civil Division

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 03C-07-213 MMJ

WILMINGTON HOSPITALITY, LLC,
A DELAWARE LIMITED LIABILITY COMPANY,
Plaintiff,

v.

NEW CASTLE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF DELAWARE,
Defendant.

Submitted: April 13, 2007
Decided: April 26, 2007

MEMORANDUM OPINION

Upon Defendant New Castle County's Motion for Summary Judgment and Motions to Exclude Expert Testimony

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Adam Balick, Esquire, Joanne Ceballos, Esquire, Balick & Balick, Wilmington, Delaware; John J. Yannacone, Yannacone & Associates, Media, Pennsylvania, Attorneys for Plaintiff

Peter J. Walsh, Jr., Esquire, Sarah E. DiLuzio, squire, Potter Anderson & Corroon LLP, Wilmington, Delaware; Hamilton P. Fox, III, Esquire, Gail

Westover, Esquire, Jay M. McDannell, Esquire, Sutherland Asbill & Brennan LLP, Washington, DC, Attorneys for Defendant.

* * *

record plan; and the events that occurred during the September 25, 2001 meeting among NCC, WH, counsel for WH, and a prospective purchaser for the hotel.

NCC filed a Motion for Summary Judgment, a Motion to Exclude the Expert Testimony of William Santora, and a Motion to Exclude the Expert Testimony fo Erich Baum. WH opposes all three motions. Following briefing, the Court heard oral argument on April 13, 2007. This case is scheduled for trial beginning June 4, 2007.

This is the Court's opinion on all three motions.

SUMMARY OF THE FACTS

For purposes of evaluating Defendant's Motion for Summary Judgment, the following facts are undisputed. WH is the former owner of a hotel located alongside Airport Road and 1-95 in New Castle County. The principals of WH are Joseph L. Capano ("Capano") and Albert Vietri ("Vietri"). WH's predecessor submitted a Preliminary Plan to NCC for construction of a 118,805 square feet hotel. NCC approved the final Record Plan on April 11, 1990. The original architectural film designed a 156,000 square feet hotel—38,000 square feet larger than the authorized Record Plan. Construction then was delayed for almost 8 years.

On August 22, 2000, WH asked for permission to open part of the hotel consisting of 102,120 square feet. NCC responded that it would issue a certificate of occupancy if WH removed the top two floors or oth-

erwise rendered unusable the space in excess of the Record Plan. NCC further advised WH that it would permit partial opening of the hotel, without the necessity of removing or disabling the top two floors, provided that Capano and Vietri and their relatives did not have any interest in the hotel for a period of 20 years. WH has alleged that the conditions proposed by NCC "would clearly destroy the value of the project and be so expensive and take so long to accomplish that WH would be forced out of business and destroyed."[1] On October 14, 2000, NCC denied WH's renewed request for a certificate of occupancy.

On October 20, 2000, WH filed a complaint in the Court of Chancery, seeking to compel NCC to issue a certificate of occupancy. The presiding Vice Chancellor was appointed acting Superior Court Judge to hear appeals from the Board of License, Inspection and Review and from the Board of Adjustment. The Court of Chancery denied WH's motions for a temporary restraining order and for a preliminary injunction. Trial was set for November 28, 2000. The day before principals. The agreement of sale was approved by the bankruptcy court. WH was required to obtain a certificate of occupancy in order to close the transaction.

WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, "was done with the intent to undermine and interfere with WH's bankruptcy."[2] WH also entered into a settlement agreement with its lender. The agreement would have permitted WH to satisfy its outstanding obligations to the lender at a discount

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[1] Complaint ¶41.

[2] Complaint ¶148.

of approximately $1,500,000. Thus, WH asserts that NCC's breach of the agreement reached during the meeting was a "malicious" attempt to prevent WH from selling the property and thereby recouping some of its financial losses.[3]

On November 30, 2001, WH brought another action in the United States District Court for the Eastern District of Pennsylvania, alleging that the November 2, 2001 letter from NCC breached the agreement to issue a temporary certificate of occupancy. The District Court referred the question of application of the bankruptcy abstention doctrine. The United States Bankruptcy Court for the Eastern District of Pennsylvania recommended abstention. The District Court then granted NCC's motion to dismiss the District Court action.

* * *

Moving party[9] Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[10]

ANALYSIS

Section 1983 Equal Protection

WH's claims pursuant to 42 U.S.C. § 1983, for deprivation of property without equal protection, rely on the factual allegation that WH has been treated differently by NCC than others similarly situated.

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[3] Complaint P ¶ 53

[9] *Id.*

[10] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

NCC disputes the similarity and differential treatment, and affirmatively argues that NCC had a rational basis for its actions.

WH is neither a member of a protected class under equal protection jurisprudence, nor do its claims implicate any fundamental right. NCC's treatment of Plaintiff, therefore, is not subject to strict scrutiny.[11] The United States Supreme Court has authorized "class of one" equal protection claims where the party can show that it has been "intentionally treated differently from others calculation (3,000 beyond what the record plan allowed), the plans which were being processed by Krishnas would improperly allow the construction of 41,603 square fee. Thus, the difference between what was allowed by Code and what Krishnas was construction was approximately 43%. No investigation was commenced by NCC to determine if Krishnas was intentionally overbuilding, no demands were made to dismantle the foundation of the hotel, and no demand was made to bar the owners of the property from having any interest in the property. Instead, Krishnas received a variance to allow it to complete its construction of the hotel The Krishnas decision was rendered on June 28, 2000, the same summer that WH's variance application was denied.

2. Parkside V, LLC

On May 27, 2003, the Delaware Racing Association, the predecessor in interest to Parkside V, LLC ("Parkside"), purchased the property at issue in this lawsuit. The contract contained the following clause:

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[11] *See Williamson v. New Castle County*, 2003 WL 549082, at *3 (Del. Ch.).

> The foregoing right to assign notwithstanding, this contract may NOT be assigned to, nor shall Seller by required to convey title to, Joseph Capano, Sr. ("Capano"), Albert Vietri ("Vietri"), or any of their spouses, natural or adopted children, natural or adopted offspring of their children, siblings, nephews, nieces or any "affiliate" . . . It is the purpose and intent of this provision to assure that Messrs. Capano and Vietri shall not through their immediate families or by any other direct or indirect means have any participation in the operation, management or ownership of the Property and that they shall obtain
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> * * *

footage. NCC did not demand demolition or foaming the excess square footage or barring the property owners from future ownership. The Concord Pet Food & Supplies, Inc. property was built 220% beyond that permitted by Code.

4. Montelone

In Montelone, the original record plan called for 2,500 square feet of office space. However, the structure, as built, was 4,832 square feet, 93% beyond that permitted by the record plan. NCC granted the variance with respect to the maximum gross floor area ratio and allowed for less than half of the required parking spaces. NCC did not demand removal of excess square footage and no one suggested that the property owners should have to forfeit their interest in the property.

5. Other projects

NCC granted a variance to 326 Associates, L.P. for reduced parking spaces where the difference between

the square footage permitted by the record plan and the square footage constructed was approximately 34%. Likewise, a square footage differential of approximately 28% beyond the record plan was allowed in Golden Dove Associates. NCC allowed a 9% height differential between what was constructed and what was permissible under the Code in the Boscov's (Brennan) matter. In addition, NCC granted itself, albeit before any construction

* * *

The Court finds, as a matter of law, that there are genuine issues of material fact as to whether the entities identified by WH are similarly situated. NCC's comparisons of its actions with regard to other entities, against its actions vis-a-vis WH, merely confirm the existence of factual disputes. NCC's arguments go to the ultimate factual question of whether similarity exists. Further, some of NCC's assertions of non-similarity rely upon its prior conclusion that the other entities did not act in bad faith. Whether or not WH acted in bad faith, and intentionally overbuilt the property, is a factual issue that goes to the core of this litigation.

NCC argues that summary judgment should be granted because the undisputed facts demonstrate that NCC had an articulated rational basis for its actions with regard to WH. In the context of equal protection claims, government action must be rationally related to a legitimate government interest.[14] WH bears the ultimate burden of proving that the reasons offered by NCC, for different treatment of similarly

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[14] *Williamson v. New Castle County*, 2003 WL 549082, at *3 el. Ch.)

situated property owners, were arbitrary and not rationally related to legitimate local interests.[15]

* * *

thereafter, NCC described the letter as a useful listing of outstanding building code issues.

NCC takes the position that no contract was made during the September 25, 2001 meeting, thus NCC would not issue a certificate of occupancy until the construction was in full compliance with all applicable laws. WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, was done with the intent to undermine and interfere with WH's ability to sell the property, resulting in monetary damages. NCC argues that whatever statements were made during the meeting could not constitute a contract because the alleged promises lacked consideration.

The Court finds a factual dispute exists as to whether the prohibition of the involvement of Capano and Vietri relatives for twenty years, is a pre-existing duty or consideration for the purported contract. The Court also finds that an issue of fact exists as to whether WH's agreement to relinquish its property to a third party constitutes consideration.

Additionally, NCC claims that any such contract would have exceeded the authority of NCC. For purposes of this motion, the Court finds this argument to be without merit. As a matter of policy, government entities cannot enter into

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[15] *Eichenlaub v. Township of Indiana*, 2007 WL 205569, at *6 (3d Cir.).

by April 2000; and fail to take into account the effect on the hotel industry of the events of September 11, 2001.

The first question before the Court is whether Santora was required to conduct an independent appraisal. An expert may rely on information of the type reasonably relied upon by experts in the relevant field.[17] The parties vigorously dispute whether experts in Santora's field may reasonably rely on information such as the HVC appraisal.

Courts may not substitute their own judgment for that of experts in the field as to what data an expert should rely upon in reaching an opinion. The trial court must make a factual inquiry and finding as to what data experts in the field find reliable[18] Before deciding whether Santora may testify as to damages, based upon the HVC appraisal, the Court must conduct a hearing to determine whether experts in the field reasonably rely on such appraisals not conducted by the testifying expert.[19]

As to the accuracy of the assumptions in the appraisal, the Court finds that issue to be a proper subject of cross-examination. For purposes of this motion,

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[17] *Conway v. Bayhealth Medical Center, Inc.*, 2001 Del. Super. LEXIS 115, at *5.

[18] *India Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 894-97 (3d Cir. 1985).

[19] Del. R. Evid 702; *Goodridge v. Hyster Co.*, 845 A.2d 498 (Del. 2004); *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

CONCLUSION

The Court finds that there are genuine issues of material fact: as to whether the entities identified by WH are similarly situated; as to whether NCC had an articulated rational basis for its apparently different treatment of WH; as to whether the prohibition of the involvement of Capano and Vietri relatives for twenty years, is a pre-existing duty or consideration for the purported contract; as to whether WH's agreement to relinquish its property to a third party constitutes consideration; the measure of alleged damages; and whether there is a causal connection between damages and the alleged breach. THEREFORE, Defendant New Castle County's Motion for Summary Judgment is hereby DENIED.

Because the witness has refused to appear at trial, NCC's Motion to Exclude the Expert Testimony of Erich Baum is hereby DENIED AS MOOT.

Before deciding whether Santora may testify as to damages, based upon the HVC appraisal, the Court must conduct a *Daubert* hearing to determine whether experts in the field reasonably rely on such appraisals not conducted by the testifying expert. THEREFORE, the ruling on NCC's Motion to Exclude the Expert Testimony of William Santora is hereby held in abeyance until the conclusion of the hearing. Plaintiff's counsel are directed to consult with judicial chambers and opposing counsel to schedule the hearing.

* * *

APPENDIX E

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 03C-07-213-MMJ

WILMINGTON HOSPITALITY, LLC,
Plaintiff,

v.

NEW CASTLE COUNTY, a political subdivision of the State of Delaware,
Defendant.

Submitted: October 2, 2007
Decided: December 28, 2007

MEMORANDUM OPINION

Upon Defendant's Motion for Judgment as a Matter of Law Upon Defendant's Motion for a New Trial Upon Defendant's Motion for Remittitur

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Adam Balick, Esquire, Joanne Ceballos, Esquire, Balick & Balick, Wilmington, DE, and John J. Yannacone, Yannacone & Associates, Media. PA, Attorneys for Plaintiff.

Peter J. Walsh, Jr., Esquire, Sarah E. Diluzio, Esquire, Potter Anderson & Corroon LLP, and Hamilton P. Fox, III, Esquire, Jay M. McDannell, Sutherland Asbill & Brennan LLP, Washington, DC, Attorneys for Defendant.

JOHNSTON, J.

PROCEDURAL CONTEXT

Wilmington Hospitality, LLC ("WH") filed this action on July 28, 2003 against New Castle County ("NCC"). The Complaint contained four counts demanding damages and declaratory relief: (1) pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights; (2) pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection; (3) inverse condemnation; and (4) breach of contractual obligation to issue a temporary certificate of occupancy. NCC moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6).

By Memorandum Opinion dated August 4, 2004, the Court dismissed: WH's cause of action under 42 U.S.C. § 1983 based upon deprivation of due process rights; and WH's claim regarding inverse condemnation. The claims remaining included: 42 U.S.C. § 1983 for deprivation of property without equal protection; and breach of contract.

NCC filed a Motion for Summary Judgment and the Court heard oral argument on April 13, 2007. The Court denied the Motion. A jury trial began on June 4, 2007. On June 12, 2007, NCC filed a Motion for Judgment as a Matter of Law. On June 18, 2007, the Jury rendered a verdict in favor of WH on its equal protection claim awarding $7,500,000.00. The jury found in favor of NCC on the breach of contract claim. On July 2,

2007, NCC renewed its Motion for Judgment as a Matter of Law. In the alternative, NCC requested a New Trial and Remittitur. WH opposes all three motions.

SUMMARY OF THE FACTS

WH is the former owner of a hotel located alongside Airport Road and 1-95 in New Castle County. The principals of WH are Joseph L. Capano ("Capano") and Albert Vietri ("Vietri"). WH's predecessor submitted a preliminary plan to NCC for construction of a 118,805 square foot hotel. NCC approved the final record plan on April 11, 1990. The original architectural firm designed a 156,000 square foot hotel—38,000 square feet larger than the authorized record plan. Construction was delayed for almost 8 years.

Following a dispute with the original firm, a second architectural firm was hired. The second firm completed the necessary drawings and filed an application for a building permit on June 5, 1998. NCC reviewed the application and issued a building permit on July 21, 1998 for a 155,480 square foot hotel.

WH invested approximately $23,000,000 to construct the hotel. On May 12, 2000, WH requested an inspection for a certificate of occupancy. NCC Department of Land Use employees visited the site. NCC found that the hotel did not conform to the record plan and that construction exceeded the plan by 38,000 square feet. NCC denied the request for a certificate of occupancy and revoked WH's building permit.

WH then applied to the NCC Board of Adjustment for nine zoning variances that would allow the hotel to open, including: (1) increasing the maximum floor area ratio to allow use of the building as constructed; (2) allowing encroachment onto the flood plain of approximately 4,000 square feet; and (3) reducing the number of required parking spaces from 325 to 202.

The Board conducted hearings on the requested variances on July 13 and 26, 2000. The Board reviewed documents and heard testimony from a representative of WH, the architects, and the project engineer. On July 27, 2000, the Board denied the variance requests. WH appealed the Board's decision to this Court.

On August 16, 2000, WH asked for permission to open part of the hotel consisting of 102,120 square feet. NCC responded that it would issue a certificate of occupancy if WH removed the top two floors or filled in the excess square footage with foam. WH witnesses testified that the conditions proposed by NCC would have destroyed the value of the project and would have been so expensive and time-consuming that WH would have been forced out of business. NCC further stated that it would permit partial opening of the hotel, without the necessity of removing or disabling the top two floors, provided that Capano and Vietri execute a "restrictive covenant on the property against ownership, management or any financial interest, for a period of twenty years, in the property, directly or indirectly, by Joseph L. Capano, Albert Vietri, or their respective spouses, children and the siblings and cousins of Capano and Vietri." On October 14, 2000, NCC denied WH's renewed request for a certificate of occupancy.

WH filed an action in the Court of Chancery, seeking to compel NCC to issue a certificate of occupancy. The presiding Vice Chancellor was appointed acting Superior Court Judge to hear appeals from the Board of License, Inspection and Review and from the Board of Adjustment. The Court of Chancery denied WH's motions for a temporary restraining order and for a preliminary injunction.

WH's lender instituted foreclosure proceedings on December 26, 2000. WH filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on June 29, 2001.

On September 25, 2001, a meeting was held among NCC, WH, counsel for WH, and a prospective purchaser of the hotel. The parties vehemently disagree as to what transpired during the meeting. WH contends that NCC agreed to issue a temporary certificate of occupancy if WH complied with the terms of a letter from NCC dated February 2, 2001. By letter dated November 1, 2001, WH's attorney referred to the February 2, 2001 letter as a "commitment." By letter dated November 2, 2001, NCC took the position that the February 2nd letter contained a useful listing of outstanding building code issues, but that NCC would not issue a certificate of occupancy until the construction was in full compliance with all applicable laws.

WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, "was done with the intent to undermine and interfere with WH's bankruptcy." WH also entered into a settlement agreement with its lender. The agreement would have permitted WH to satisfy its outstanding obligations to the lender at a discount of approximately $1,500,000. Thus, WH asserts that NCC's breach of the agreement reached during the meeting was a "malicious" attempt to prevent WH from selling the property and thereby recoup some of its financial losses.

On November 2, 2001, WH executed a contract to sell the hotel to a company whose principals were not related to or affiliated with WH or its principals. The

agreement of sale was approved by the bankruptcy court.

ANALYSIS

Judgment as a Matter of Law

Under Rule 50(b) the Court may "allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law."[1] This Court must decide whether, under any reasonable interpretation of the evidence, the jury could justifiably find in favor of the non-moving party and against the moving party.[2] The jury verdict is entitled to "enormous deference."[3] "The factual findings of a jury will not be disturbed if there is any competent evidence upon which the verdict could reasonably be based."[4]

NCC argues a Judgment as a Matter of Law is appropriate because the jury verdict is unsupported by the record, against the weight of evidence and not supported by equal protection jurisprudence.

Section 1983 Equal Protection

The United States Supreme Court has authorized "class of one" equal protection claims where the party can show that it has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in

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[1] Super. Ct. Civ. R. 50(b).

[2] *Ebersole v. Lowengrub*, 208 A.2d 495, 497-98 (Del. 1965).

[3] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997); Del. Const. art. IV, § 11(1)(a).

[4] *Gillenardo v. Connor Broad. Delaware Co.*, 2002 WL 991110, at *6 (Del. Super. Apr. 30, 2002).

treatment"[5] The party asserting the equal protection violation must: (1) identify others who are "similarly situated"; (2) show that these similarly situated entities were treated differently; (3) show that the differential treatment was intentional, in the sense of deliberately singling out or being motivated by animus; and (4) demonstrate that there is no rational basis for any differential treatment.[6]

In assessing judgment as a matter of law, the Court will not act as a "zoning board of review,"[7] but will determine whether the jury's findings were rationally based on competent evidence. The Court will focus specifically on the two elements discussed in NCC's brief: (1) the high degree of similarity required to establish equal protection; and (2) the demonstrated rational basis offered by NCC to justify any differential treatment.

Entities Identified by Plaintiff as "Similarly Situated"

WH's equal protection claim requires a finding that developers seeking permits from NCC were treated differently than WH because "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause."[8] To find that two projects were similarly situated requires some specificity.[9]

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[5] *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

[6] *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006).

[7] *Greenbriar Vill., L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir. 2003).

[8] *E&T Reality v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987).

[9] *Campbell v. Rainbow City*, Alabama, 434 F.3d 1306, 1314 (11th Cir. 2006).

WH does not have to prove that they are identically situated, but must prove that WH was "treated differently than someone who is *prima facie* identical in all relevant respects."[10]

NCC contends there are aspects of similarity that must exist before the Court allows the jury to consider the issue Additionally, the Court must impose "exacting burdens on plaintiffs to demonstrate similarit[11] or an "extremely high degree of similarity."[12] NCC argues the projects WH claims received differential treatment are not similar situated. Additionally, without the requisite demonstration of similarity, the Court should not have allowed the jury to consider the issue.

"The ultimate determination of whether parties are similarly situated is a fact-bound inquiry and, as such is normally grist for the jury's mill."[13] The burden of proving substantial similarity requires a "high degree of similarity," not an "exact correlation."[14] "[T]he degree of similarity required may be relaxed somewhat if the plaintiff has presented evidence of 'personal malice and bad faith' retaliation."[15] A directed verdict is appropriate where it is clear that no reasonable jury could find that the comparators are similarly situated.[16]

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[10] *Purze v. Winthrop Harbor,* 286 F.3d 452, 455 (7th Cir. 2002).

[11] *Jicarrilla Apache Nation v. Rio Arriba Cty.*, 440 F.3d 1202, 1213 (10th Cir. 2006).

[12] *Clubside, Inc. v. Valentin,* 468 F.3d 144, 159 (2d Cir. 2006).

[13] *Cordi-Allen v. Conlon,* 494 F.3d 245, 251 (1st Cir. 2007).

[14] *Id.; Tapalian v. Tusino,* 377 F.3d 1, 6 (1st Cir. 2004).

[15] *Cordi-Allen,* 494 F.3d at 251 n.4; *Tapalian,* 377 F.3d at 7.

[16] *Harlen Assocs. v. Inc. Vill. of Mineolo,* 273 F.3d 494, 499 n.2 (2d Cir. 2001).

There are three possibilities:

> (1) If a reasonable jury COULD ONLY FIND that the entities were similarly situated to plaintiff, the Court must enter a directed verdict for plaintiff.
>
> (2) If NO reasonable jury COULD FIND that the entities were similarly situated to plaintiff, the Court must enter a directed verdict for defendant.
>
> (3) If a reasonable jury COULD FIND that the entities were similarly situated to plaintiff, the Court must give the issue to the jury.

At the conclusion of the evidence, the Court found that a reasonable jury could (but also might not) find that the entities were similarly situated to WH. Therefore, the Court denied NCC's motion for a directed verdict and deferred to the jury's determination. The Court finds no reason to alter this conclusion following the jury's verdict.

WH presented evidence supporting its allegations of substantial similarity.

1. Krishnas, LLC Hotel Project.

Krishnas, LLC ("Krishnas") was in the process of constructing a hotel when NCC learned of a 3,000 square foot discrepancy between the record plan and the construction plans. An attorney for a contractor on the project submitted a detailed analysis demonstrating that even allowing for Krishnas' 31,413 square feet calculation (3,000 beyond what the record plan allowed), the plans which were being processed by Krishnas would improperly allow the construction of 41,603 square feet. Thus, the difference between what the contractor's attorney maintained was

allowed by Code and Krishnas' construction was approximately 43%, which was 47% beyond that permitted by the record plan. NCC did not investigate to determine if Krishnas was intentionally overbuilding. No demands were made to dismantle part of the hotel and no demand was made to bar the owners of the property or their relatives from having any interest in the property. NCC granted Krishnas a variance to allow completion of construction. The Krishnas decision was rendered on June 28, 2000, the same summer that WH's variance applications were denied.

2. Parkside V, LLC.

On May 27, 2003, the Delaware Racing Association, the predecessor in interest to Parkside V, LLC ("Parkside"), purchased the exact property that is the subject of this litigation. Parkside requested variances which mirrored those that had been sought by WH, including: (1) increasing the maximum permitted gross floor area to accommodate the square footage of the building as constructed; (2) reducing the number of required loading berths from 3 to 1; (3) reducing paving setback requirements; (4) reducing the opacity requirement along Airport Road; (5) reducing the required landscape surface ratio; and (6) permitting an encroachment onto the floodplain. NCC issued a report recommending that Parkside's variance requests be granted. NCC noted that there would be a restriction on the future transfer of the property to Capano, Vietri or any of their family members for a period of twenty years. NCC further found that "clearly, without plan approval, there can be no beneficial use of the Property . . . applicant has been denied substantially all economically viable use of the Property through application of the UDC." The

Board granted all of Parkside's variance requests. The Board found that "given its location in the flood-plain, the Property loses economic viability for any use without the Board granting a beneficial use appeal." NCC did not demand the removal of any excess square footage.

3. Concord Pets Food & Supplies, Inc.

Concord Pets Food sought a variance from the maximum building square footage of 3,445 square feet to maintain 11,020 square feet of gross floor area at its commercial property. NCC approved this variance, representing a differential of approximately 220% beyond that permitted by code and other variances relating to paving setbacks, opacity and landscape surface ratio. NCC did not demand demolition or foaming the excess square footage, or barring the property owners and their relatives from future ownership.

4. Montelone.

Montelone built a 4,832 square feet structure difference of approximately 93% beyond the 2,500 square foot record plan of office space. NCC granted the variance with respect to the maximum gross floor area ratio, allowed for less than half of the required parking spaces, and granted related variances regarding opacity and paving setbacks. No demands were made by NCC for removal of excess square footage, or that the property owners and their relatives forfeit their interest in the property.

5. Other Projects.

NCC granted 326 Associates, L.P., a variance for reduced parking spaces where the difference between the square footage permitted by the record plan and the square footage constructed was approximately

34%. A square footage differential of approximately 28% beyond that permitted by Code was allowed to Golden Dove Associates. A 9% height differential between what was constructed and what was permitted by code was granted to Boscov's. NCC granted itself, albeit before any construction commenced, a variance allowing for an increase in height, of approximately 63% beyond that permitted by code, for its police headquarters. NCC noted the majority of the property borders a landfill and other industrial or heavy industrial zoned property.

* * * *

In support of its motion, NCC presents cogent and detailed arguments as to why the comparators are not similar. NCC also claims that WH failed to clarify the precise conduct, or the specific course of conduct, underlying NCC's differential treatment. These arguments, and NCC's evidence supporting these arguments, were presented to the jury. Clearly, the jury found WH's evidence and reasoning more convincing.

NCC also claims that the Court erred by failing to give a jury instruction conveying an appropriately high burden needed to establish the similarly situated element." The Court's instruction was:

> As to the first element of the claim, in determining whether other landowners were similarly situated, you may consider whether a prudent person, looking, objectively at. the incidents, would consider them similarly situated.[17]

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[17] *See Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 19S9) ("The test is whether a prudent person, looking objectively at the incidents, would think them roughly

The Court declined to give NCC's proposed instruction because the instruction was unduly complicated and confusing, and stated the law in a manner strongly biased in favor of NCC.

The Court's job is not to assess the findings of the jury. The Court must determine if WH provided competent evidence of similarly situated projects so that a reasonable jury could find for WH. WH provides examples of two hotel projects and two commercial projects that were granted variances by NCC during the same time period. In fact, the Parkside hotel project involved the same property, use and *variances* as those requested by WH. The Court finds NCC established a *prima facie* case of similarly situated projects, sufficient for jury consideration.

Rational Basis for Differential Treatment

The purpose of the Equal Protection Clause is to prevent a statute or state official from operating in an arbitrary or intentionally discriminatory manner.[18] In the context of equal protection claims, government action must be rationally related to a legitimate government interest.[19] An action must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis."[20]

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equivalent and the protagonists similarly situated."); *Cordi-Allen*, 494 F.3d at 251 ("Plaintiffs claiming an equal protection violation must first identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently.").

[18] *Olech*, 528 U.S. at 564.

[19] *Williamson v. New Castle Cty.*, 2003 WL 549082, at *2 (Del. Ch. Feb. 20, 2003).

[20] *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 313 (1993).

NCC argues that it provided a rational basis for the differential treatment of WH. In short, NCC states the reasons for differential treatment include substantial parking deficiency, environmental encroachment, the sheer magnitude of the overbuild, unfair competitive advantage to WH, unpermitted uses, and WH's bad faith.

WH has the burden to show the reasons proffered by NCC were not rationally related to legitimate government interest.[21] NCC argues that the only question is whether its articulated reasons, for apparently different treatment of WH, are rationally related to a legitimate government interest. Further, NCC contends that this limited issue is a question of law for the Court to decide. NCC reasons that "the decision concerning what constitutes a rational basis is undoubtedly in the hands of the Court because it would be almost impossible to convey to a jury the very differential standard of rational basis found in the law."

The Court disagrees. In this case, the issue of whether NCC's actions are rationally related to a legitimate government interest is for the trier of fact.[22] The main reason articulated by NCC for its treatment of WH is that WH acted in bad faith. NCC is correct that the salient factual question is not whether WH indeed acted in bad faith. Rather, the question is whether NCC had a rational basis for believing that WH acted in bad faith.

However, merely stating a plausibly rational reason is not sufficient. There must be some reasonable

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[21] *Id.* at 315.

[22] *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 690 (1999).

factual basis for the reason. Otherwise, all a government entity would have to do is pronounce a superficially credible reason, in order to pass equal protection muster. The Court is not limited to evaluating NCC's stated rational basis without further judging whether the merits are related to a legitimate government interest.[23]

There are three possibilities:

> (1) If a reasonable jury COULD ONLY FIND that defendant NCC had a reason, rationally related to a legitimate government interest, for apparently different treatment of plaintiff WH, the Court must enter a directed verdict for plaintiff.
>
> (2) If NO reasonable jury COULD FIND that defendant NCC had a reason, rationally related to a legitimate government interest, for apparently different treatment of plaintiff WH, the Court must enter a directed verdict for defendant.
>
> (3) If a reasonable jury COULD FIND that defendant NCC had a reason, rationally related to a legitimate government interest, for apparently different treatment of plaintiff WH, the Court must give the issue to the jury.

The Court found that questions of fact predominated the issue of whether NCC's articulated reasons, for apparently different treatment of WH, were rationally related to a legitimate government interest. Therefore, the Court denied NCC's motion for a directed verdict and deferred to the jury's deter-

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[23] *See Acierno v. New Castle Cty.*, 2000 WL 718346, at *4 (D.Del. May 23, 2000).

mination. The Court finds no reason to alter this conclusion following the jury's verdict.

Motion for New Trial

Under Superior Court Rule 59, the Court may grant a motion for new trial.[24] However, the Court gives enormous deference to jury verdicts.[25] If any reasonable difference of opinion exists, the Court will yield to the jury's decision.[26] This Court will only grant a new trial if the jury disregarded applicable rules of law, or "the verdict is tainted by legal error committed by the Court during the trial."[27]

For the reasons underlying the denial of NCC's Motion for Judgment as a Matter of law, NCC's Motion for New Trial is denied.

Motion for Remittitur

In the absence of exceptional circumstances, the jury's award of damages should be deemed appropriate. Under Delaware law, enormous deference is given to jury verdicts. Reasonable differences of opinion are resolved in favor of the jury's opinion. The court will set aside a jury's verdict only in the rare case where it is "clear that the award is so grossly out of proportion to the injuries suffered, as to shock the court's conscience and sense of justice."[28] Remittitur is required only when the award of damages is so excessive that it must have been based

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[24] Super. Ct. Civ. R. 59.

[25] *Young v. Frase*, 702 A.2d 1234, 1236-37 (Del. 1997).

[26] *Id.*

[27] *Mitchell v. Haldar*, 2004 WL 1790121, at *3 (Del.Super. Aug. 31, 2007).

[28] *Id.* at 1236.

on passion, prejudice or misconduct, rather than on objective consideration of evidence presented at trial.

The jury assessed the credibility of all witnesses and determined the weight to be given to their testimony. The jury considered voluminous exhibits, including specific financial information. The damages evidence was detailed and vigorously contested.

NCC argues that the "jury verdict was pulled from thin air" and that it was excessive and unsubstantiated by the evidence. The damage calculation does not have to be made with mathematical certainty.[29] The jury may give an approximation based on facts presented at trial.[30] The jury heard evidence regarding WH's net out-of-pocket expenses, the estimated lost value of the hotel, various contracts and settlement agreements among WH and third parties, and the ultimate purchaser's cost to complete the hotel.

The Court finds the damages awarded by the jury are supported by the evidence presented at trial. Therefore, the Motion for Remittitur is denied.

CONCLUSION

At the conclusion of the evidence, the Court found that a reasonable jury could find that the entities identified by plaintiff were similarly situated to plaintiff. The Court also found that a reasonable jury could, or might not, find that defendant NCC had a reason, rationally related to a legitimate government interest, for apparently different treatment of plaintiff. THEREFORE, the equal protection issue was

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[29] *Cura Fin. Serv. v. Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *20 (Del. Ch. Oct. 22, 2001).

[30] *Young*, 702 A.2d at 1236-38.

properly presented to the jury. Defendant New Castle County's Renewed Motion for Judgment as Matter of Law is hereby DENIED.

The Court finds that the interests of justice do not require setting the jury's verdict aside. THEREFORE, Defendant New Castle County's Motion for a New Trial is hereby DENIED.

The Court finds that the damages awarded by the jury are not out of proportion to the injuries suffered, so as to shock the Court's conscience and sense of justice. THEREFORE, Defendant New Castle County's Motion for Remittitur is hereby DENIED.

IT IS SO ORDERED.

/s/ Mary M. Johnston
MARY M. JOHNSTON
The Honorable Mary M. Johnston

APPENDIX F

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

C.A. No. 03C-07-213

NEW CASTLE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF DELAWARE,
Defendant Below,
Appellant / Cross Appellee,

v.

WILMINGTON HOSPITALITY, LLC,
Plaintiff Below,
Appellee / Cross Appellant.

Court Below: Superior Court of the state of Delaware in and for New Castle County

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No. 24, 2008

Submitted: September 17, 2008
Decided: December 22, 2008

Before BERGER, JACOBS and RIDGELY, Justices.

Upon appeal from the Superior Court. REVERSED and REMANDED.

Peter J. Walsh, Jr., Esquire, (argued) and Sarah E. DiLuzio, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware; Of Counsel: Hamilton P. Fox,

III, Esquire and Jay M. McDannell, Esquire of Sutherland Asbill & Brennan LLP, Washington, D.C. for *Appellant / Cross Appellee.*

Adam Balick, Esquire and Joseph S. Naylor, Esquire of Balick & Balick, LLC, Wilmington, Delaware; Of Counsel: John J. Yannacone (argued) of Yannacone & Associates, Media, Pennsylvania for *Appellee / Cross Appellant.*

BERGER, Justice:

In this appeal we consider, among other matters, whether the Superior Court erred in deciding that a developer's equal protection claim presented triable issues of fact. The developer alleged that New Castle County arbitrarily treated the developer differently from other, similarly situated landowners by preventing the developer from opening its hotel. The record establishes that the hotel failed to comply with the applicable zoning codes, and that the Board of Adjustment denied the developer's request for nine variances. None of the other Board decisions relied upon by the developer to show disparate treatment were *prima facie* identical. Thus, the developer's equal protection claim fails at the threshhold. In addition, the Board's decision, which was not challenged,[1] provides a rational basis for its denial of the developer's requested variances. As a result, there was no support for the developer's claim that it was treated arbitrarily. We also find no merit to the developer's due process and inverse condemnation claims. Accordingly, we reverse the judgment in favor of the developer, and affirm the Superior Court's dismissal of the developer's other claims.

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[1] The developer abandoned its appeal of the Board decision.

FACTUAL AND PROCEDURAL BACKGROUND

In April 1990, a predecessor of Wilmington Hospitality, LLC, ("WH"), owned by Joseph L. Capano and Albert A. Vietri, obtained final plan approval for a hotel to be built at the intersection of 1-95 and Airport Road in New Castle County. The Record Plan authorized construction of a 118,805 square foot hotel. WH hired an architect, who designed a 155,480 square foot hotel. Nothing more was done for several years, as market conditions were unfavorable. In June 1998, after another architect completed the plans, WH applied for a building permit for a 155,480 square foot hotel. A few weeks later, WH entered into a sewer agreement with the County that recited the hotel size as 118,805 square feet. The County issued a building permit and WH proceeded with construction.

In May 2000, as the hotel neared completion, WH requested an inspection by the County in order to obtain a certificate of occupancy ("CO"). The inspectors noticed that the parking configuration was not consistent with the Record Plan. They also determined, among other things, that: (i) the hotel was significantly larger than the size stated in the Record Plan; (ii) it included banquet halls, meeting rooms, and other facilities that would necessitate additional parking; and (iii) it included a kitchen area for which no building permit had been issued. On June 22, 2000, the County issued a violation notice to WH and revoked its building permit. The violation notice stated that WH had provided "false statements . . . in the application and/or on the plans on which the permit or approval was based."

Over the next several months, WH tried to resolve the problems arising from the discrepancies between the Record Plan and the hotel, as built. In addition to

submitting revised plans for parking spaces, WH discussed the possibility of opening only a portion of the hotel until the entire matter was resolved, but the County rejected that option. WH applied to the New Castle County Board of Adjustment for nine variances that, if granted, would have enabled WH to obtain. a CO. The Board held a two-day hearing in mid-July 2000 and announced its decision denying the application at the end of that month.[2]

In August 2000, WH asked the County to issue a temporary CO, allowing the first four floors of the hotel (102,120 square feet) to be opened. The County responded that no CO would be issued unless WH removed, or rendered unusable, the top two floors. In later discussions and correspondence, the County suggested either tearing down those floors or filling them with foam. In September, WH's lender met with the County, but the County remained steadfast in its position. As a result, the lender demanded that WH bring the hotel into compliance with all applicable codes; declared WH's loan in default; and required WH to deposit $1.5 million in additional collateral.

On October 20, 2000, WH filed an action in the Court of Chancery seeking a mandatory injunction requiring the County to issue a CO. The Vice Chancellor was appointed an acting Superior Court judge in order to give him jurisdiction to hear and decide all matters relating to the hotel, including WH's appeal of the Board's decision denying the variances. After denying WH's [notions for a temporary restraining order and a preliminary injunction, the court set a trial date for November 28, 2000. The day before trial, however, WH notified the

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[2] The Board issued a written decision on September 29, 2000.

Court of Chancery that it was not ready to proceed. WH never prosecuted its Chancery action, which was dismissed in 2005.

While seeking a resolution that would allow the hotel to open, WH also explored the possibility of selling the hotel. The County advised that it would be willing to work with a new owner, but that the deed to the new owner would have to include a restriction barring the Capano and Vietri families from having any interest in the hotel for 20 years. In a letter dated February 2, 2001, the County advised WH of the items that had to be resolved before a temporary or permanent CO would be issued to any buyer. The February 2 letter indicates that, instead of foaming or tearing down the top two floors of the hotel, those floors could be made inaccessible by locking all the doors and eliminating elevator access.

WH found two potential buyers, and entered into all agreement of sale with Reese Hotels. LLC in November 2001. By that time, the lender had instituted foreclosure proceedings and WH had declared bankruptcy. The Reese sale, which was approved by the bankruptcy court, would have netted WH approximately $7.45 million after repaying the lender. That sale never closed, however, because the County would not issue a CO. In a letter dated November 2, 2001, the County explained that the February 2 letter reflected the terms of a possible settlement that the Court of Chancery had asked the parties to discuss. The parties did not reach agreement, and the County's November letter advised that no CO would be issued until the unauthorized excess floor space was removed.

Before agreeing to sell the hotel to Reese, WH had entered into a settlement agreement with its lender.

The settlement agreement gave WEI until March 31, 2002, to pay the lender $13.85 million in satisfaction of its outstanding debt. WH failed to make the payment, and the lender took title to the hotel in April 2002. One year later, the lender sold the hotel to Parkside V, LLC for $11.2 million. Parkside also acquired an adjacent parcel of land and used some of that additional land to address parking and other problems identified by the Board in its denial of WH's application for nine variances. On January 20, 2004, the Board approved Parkside's application for six variances, Because Parkside included the deed restriction that the County had insisted upon, it was not required to tear down the top two floors of the hotel.

WH filed this action in the Superior Court on July 29, 2003. The complaint purports to allege four claims against the County: I) violation of substantive due process, based on the County's alleged had faith and its "arbitrary and irrational conduct and . . . egregious abuse of power which shocks the conscience;" 2) violation of equal protection, based on the County's alleged failure to treat WH in the same manner as similarly situated landowners; 3) a taking of WH's property without just compensation, based on the County allegedly depriving WH of all economically viable use of its property (inverse condemnation); and 4) breach of contract, based on the County's refusal to issue a temporary CO under the terms of an agreement allegedly set forth in the County's February 2, 2001 letter.

The Superior Court dismissed the due process and inverse condemnation claims for failure to state a claim upon which relief could be granted. The trial court also denied WH's motion to amend the

complaint to allege a temporary or partial taking by the County. After trial, the jury found in favor of WH on the equal protection claim and awarded WH $7.5 million in damages. The jury found in favor of the County on the breach of contract claim. The trial court denied the County's post-trial motions and this appeal followed.

DISCUSSION

WH's equal protection claim is a "class of one" claim. In *Village of Willowbrook v. Olech,*[3] the United States Supreme Court explained the nature of such a claim:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

Thus, the two critical components of WH's equal protection claim are: I) that there were similarly situated developers that were treated differently; and, 2) that the County had no rational basis to treat WH as it did. To prevail on the first prong, WTI must establish "an extremely high degree of similarity"[4] between its circumstances and those of others who were treated differently ("comparators"). Stated another way, the comparators must he *"prima facie* identical in all relevant respects."[5] Generally, this is

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[3] 528 U.S. 562, 564 (2000).

[4] *Cordi Alien v Conlon,* 494 F.3d 245, 251 (1st Cir. 2007) (Quotations omitted.).

[5] *Purze v. Village of Winthrop Harbor,* 286 F.2d 452, 455 (7th Cir. 2002).

a fact question for the jury, but summary judgment is appropriate "where it is clear that no reasonable jury could find the similarly situated prong met.[6] If WH establishes disparate treatment, it then must prove that the County lacked any rational basis for that treatment. This prong, too, is subject to summary disposition.[7]

The trial court denied the County's motion for summary judgment, without addressing the relevant standards or analyzing the record. The trial court simply concluded that there were genuine issues of material fact in dispute. The record is clear, however, that none of WH's comparators were similarly situated. WH applied for nine variances that would, among other things, increase the maximum permitted size from 118,805 to 158,176 square feet; reduce the number of parking spaces from 325 to 202; and reduce setbacks, open space requirements and buffers. The Board found, based on documents and testimony of numerous witnesses, that WH did not act in good faith:

> The applicant acknowledged that he had to have been aware of the square footage limitations at some point, however, this limitation never factored into his considerations for the project. There is evidence in the record to indicate that the applicant (or his agents) was repeatedly given the opportunity to discover the discrepancy between the record plan and the proposed building size. Many of these opportunities occurred prior to the time construction

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[6] *Harlen Assocs., Inc, v. Val. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001).

[7] *Id* at 500.

> commenced . . . . Moreover, there was evidence submitted to suggest that the developer was aware of the discrepancy and took affirmative steps to conceal the discrepancy from third parties. In particular, the Artesian Water letters (with the changed square footage numbers) and the representation in the HVS appraisal that the developer had communicated to it that, despite the record plan's square footage limitation of 118,805, the "correct figure" was 156,000 square feet, are illustrative of this point. Both of these representations occurred prior to the time construction commenced . . . .[8]

Only two of the comparators relied upon by WH are hotels. Because the use of a proposed development is "quite relevant," WI-I's remaining comparators must be rejected as not sufficiently similar.[9] The two hotel projects are Krishnas, LLC and Parkside V, LLC. Krishnas sought a variance permitting construction of a 31,412 square foot hotel, which would be 2,228 square feet larger than permitted by code and 3,063 square feet larger than the record plan. The Board granted the variance, after finding that the overbuild was the result of an innocent mistake; that the dimensional change was minimal; and that it would "result in no appreciable harm to the surrounding community."[10]

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[8] WH Board of Adjustment Decision, Appellant's Appendix, A 092.

[9] *Campbell v. Rainbow City, Alabama*, 434 F.3d 1306, 1314 (11th Cir. 2006).

[10] Krishnas, LLC Board of Adjustment Decision, Appellant's Appendix, A 044.

The second hotel project, Parkside, was a request for six variances for the same hotel previously owned by WH. In approving the Parkside variances, the Board noted:

> 'Unlike WH, the current Applicant is not tainted with had faith. Thus, one of the Department's primary objections to the granting of variances is eliminated . . . Another major difference is with the degree of the variance requests. WH sought much wider relief . . . and made minimal attempts to comply with any Code provisions. Rather than provide real parking alternatives, WH simply pursued the argument that 202 parking spaces would be sufficient. This was a major concern of the Department. However, the Applicant has addressed the Department's primary site concern—insufficient parking—by acquiring land and proposing additional parking spaces
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> * * *
>
> Applicant has significantly increased the size of the Hotel Site by acquiring the State Property and restricting the Mitigation Site from future development . . . Although the additional land is located in the floodplain, the Parkside Plan provides the protection to the community that the UDC is designed to offer through its site capacity limitations.
>
> * * *
>
> The entire Hotel Site is located within the floodplain . . . Granting the variances could result in increased stormwater runoff and sedimentation on adjoining properties . . . The harm to neighboring property and the community from these environmental threats has not been ignored by

> the Parkside. Applicant has offered that they are in discussions with Delaware Department of Transportation to acquire additional land along the perimeter of this site . . . , Applicant has represented that landscaping will be provided . . . and the area will be revegetated. Additionally, redesigned stormwater management and riparian buffer enhancements will be provided.[11]

In light of the high degree of similarity required to state a "class of one" equal protection claim, there is no question but that WH's comparators were not similarly situated. Krishnas overbuilt as a result of an innocent mistake, and sought only one variance for a "minimal" dimensional change that would result in no harm to the neighborhood. "[D]evelopments seeking different variances cannot be considered similarly situated."[12] WH sought nine variances covering a much more significant dimensional change, as well as parking, setback, buffer and other changes. Thus, even if one were to ignore the good faith difference, the Krishnas application would not be sufficiently similar to support WH's claim.

The Parkside application also fails as a comparator. Although Parkside applied for variances relating to the same hotel as WH, there were significant differences between the two applications. Parkside did not act in had faith and requested only six variances. Moreover, Parkside purchased adjoining property and used that property to provide the required parking, whereas WH wanted a variance to allow it to operate with significantly fewer parking spaces. Fi-

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[11] Parkside V, LLC Board of Adjustment Decision, Appellant's Appendix, A 222-25.

[12] *Campbell v. Rainbow Cit Alabama*, 434 F.3d at 1316.

nally, Parkside represented that it would purchase another adjoining parcel to provide environmental/buffering protection.

WH's equal protection claim should have been dismissed for failure to present comparators that were similarly situated. The same result would have obtained under the second prong—the rational basis test. Although it is not necessary to our decision, we reach this issue because WH apparently convinced the trial court that its equal protection claim encompassed all of its interactions with the County. To demonstrate that the County's actions were arbitrary and vindictive, WH focused on facts such as:) the County Executive's apparent dislike for the WH principals, inferable from his statement that WH would not get a CO as long as he was County Executive, and his pleasure at the fact that WH declared bankruptcy; 2) the County's allegedly unreasonable demand that WH either tear down or foam in the top two floors of the hotel in order to obtain a temporary CO; and 3) the County's allegedly punitive demand that the principals of WH and their families not retain any interest in the hotel after it was sold.

In pursuing this theory, WH ignores the fact that it knowingly built a hotel that did not comply with applicable zoning and building codes. As a result, WIT could not be issued a CO until it brought the hotel into compliance—either by modifying the hotel or by obtaining variances for any non-compliance.[13] The Board denied WH's application for variances based on factual findings and legal conclusions supported by the evidence, including a finding that

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[13] *See:* 9 Del.C. §§1313, 2511.

WIT knew it was overbuilding and acted in had faith. WTI abandoned its appeal of that decision, and presented no evidence questioning the Board's fairness or impartiality. Thus, the Board's decision stands, and no reasonable juror could find that it was irrational or arbitrary.

Without the needed variances, WH's only options were to bring the hotel into compliance (which would be prohibitively expensive) or to sell the hotel to an entity that, because it would not be tainted by WH's had faith, would have a better chance of obtaining the variances. The County was under no obligation, to assist WH in working its way out of this self-created dilemma. From the County's perspective, WH had tried to "get away" with ignoring the Code, and it was not going to help WH by making concessions or granting temporary COs. WH never attempted to show that the County had been more generous with other developers who knowingly overbuilt and were denied variances. Absent such a showing, WH had no claim.

In its cross-appeal, WH contends that the trial court erred in dismissing its due process and inverse condemnation claims, and that the trial court should have allowed WH to amend its complaint to state a partial taking claim. We find no merit to these arguments and affirm on the basis of the trial court's decisions dated August 4, 2004, October 4, 2004 and May 24, 2005.

CONCLUSION

Based on the foregoing, the judgment in favor of WH is reversed and this matter is remanded for entry of judgment in favor of the County on all claims.

* * *

APPENDIX G

[LOGO]

Department of Land Use

NOTICE OF DECISION

REFERENCE: Application 00-0552-A

DATE DECISION FILED: September 29, 2000

APPLICANT: WILMINGTON HOSPITALITY, LLC
C/O WELLINGTON HOMES
1601 Concord Pike, Ste. 27
Wilmington, DE 19803

PUBLIC HEARING DATE: July 13 & 26, 2000.

DATE OF AMENDED DECISION: September 29, 2000

REQUESTED: Applicant requested the following Dimensional Variances from the Unified Development Code:

1. Reduce the number of required loading spaces from 3 to 1 (§ 3.510(A)(2));
2. Reduce the number of required parking spaces from 325 to 202 (§§ 3.522 & 22.616);
3. Reduce the required landscape surface ratio from 100% to 29.1% (Table 4.110(A));
4. Increase the maximum permitted gross floor area ratio to permit a building 158,176 square feet in size to exist where 118,805 is depicted on the record plan and 0 foot expansion is permitted (Table 4.110A));
5. Reduce the opacity requirement along Airport Road from .4 to .0 (Table 4.111(A));
6. Reduce the parking setback requirements from 25 feet along rights of way and 5 feet along property

lines to 0 feet and 2 feet respectively (Table 4.110(B));

7. Reduce the required lot/acre open space and parking planting units to permit that depicted on a prior record plan (Table 4.111(A));

8. Reduce the bufferyard opacity from .2 to .0 (Table 4.111(B)); and

9. To permit an encroachment of 75 feet into a riparian buffer area (§ 10.330 and Division 33.000);

365 Airport Road, New Castle; CR zoning (pending), CD I; Tax Parcel 10-013.00-001.

The Board of Adjustment may grant a variance from the area or dimensional requirements of the County Code where it finds the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code applicable to the subject property

The subject property is a multi-acre parcel located along Airport Road near its intersection with the Route 141 off-ramp from northbound I-95. The site, as it is currently developed, houses a nearly complete full-service Radisson hotel, containing 150 suites, 41 single rooms, a banquet hall, a restaurant and bar, meeting rooms and other amenities. The site has 202 parking spaces for its guests and staff. The structure itself is over 39,000 square feet larger than depicted on the record plan. Because of this excess size, the applicant is before the Board of Adjustment to request nine variances mandated by the structure's nonconformance with the record plan.[1]

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[1] The fact that the budding does not comport with what has been depicted on the record plan resulted in the need to secure at

This hotel project commenced in 1989. The applicant's predecessor acquired the subject parcel contingent upon a rezoning for the purpose of constructing a hotel.[2] At the hearing before the Planning Department and Planning Board, the applicant's representative testified that they intended to construct a 125,000 square foot, full-service hotel with several amenities. The applicant's representative identified the square footage of the floors, indicating approximately 26,740 square feet on the first floor and 19,740 square feet on each remaining floor. The site was ultimately rezoned and the applicant proceeded toward record plan approval. Along the way, however, one or more DelDOT takings resulted in the scope of the project being reduced to 118,805 square feet. This was the amount of building permitted on the site pursuant to the record plan approved by County Council in April of 1990. Throughout the planning process, the plans submitted did not specifically show any of the proposed accessory uses to be located at the hotel. As a result; the initial parking calculations were based entirely on the number of rooms at the hotel, along with the 4 parking spots mandated by the Code for employees (1 spot for every 3 employees).

Following the approval of this record plan, the project remained dormant until the late 1990's, although the architect had prepared preliminary but detailed plane for the construction of the hotel.[3] In 1997, Mr.

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least proportional compliance with the provisions of the U.D.C.

[2] To commence this project, the applicant also needed to secure permission from County Council to build in the floodplain.

[3] The stated reason for this dormancy was an economic downturn in the hotel/motel market which made financing the

Joseph Capano, a principal in Wilmington Hospitality LLC, decided to proceed with the project and contacted the architects and asked them to complete the construction plans. When the original architect and the applicant could not agree on the cost of engagement to complete the project, a second architectural firm was retained to finish the job. An employee of the architectural firm ultimately submitted a building permit application seeking permission to construct a 155,480 square foot structure. This application was approved by the Department of Land Use on July 21, 1999. Around the same time, Mr. Capano signed a sewer agreement and a site construction agreement indicating his intention to build a 118,805 square foot structure. After at least one false start, construction commenced, proceeding until June of 2000 when a stop work order was issued following the revocation of the building permit This action was taken following the County's discovery that the building, as constructed, had slightly exceeded the size permitted by the building permit and that it had deviated significantly from what was approved on the record plan. Through discussions with the Department of Land Use, it was determined that the above-listed variances, at a minimum, would be required before the hotel could open.

At the hearing before the Board, the applicant presented six witnesses in support of its application and submitted a number of documents into evidence. Mr. Capano was the first to testify. He indicated that at no time was he consciously aware of the 118,805 square foot limitation contained on the record plan or that the building being constructed was significantly larger than that. In his mind, he was focused com-

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project too difficult.

pletely on the concept of a full-service hotel with approximately 195 roams blended in a suite/single-room motif. Mr. Capano testified that he did not focus on square footage because the number of rooms and not the square footage drove the economics of this project, unlike a shopping center or offices.

Mr. Capano testified that, in 1990, he instructed his engineer to maximize the development potential for the site. Also in 1990, Mr. Capano and his architect traveled to Arizona to inspect a hotel Mr. Capano desired to use as a model for the Radisson. The architect, operating not from a limitation on square feet, but on the number of rooms Mr. Capano desired, began the design process for the hotel. While Mr. Capano testified he did not discuss square footage with Mr. Chickadel, he believed Mr. Chickadel received a copy of the record plan. After the project stalled, a second architect, Mr. Wilson of Architectural Alliance was engaged to complete the design started by Mr. Chickadel. Again, Mr. Capano testified that he never discussed square footage with Mr. Wilson, however, he acknowledged that Mr. Wilson probably received a copy of the record plan. When pressed on the discrepancy between what was built and what was permitted by the record plan, Mr. Capano indicated that he was not focused on square footage. His focus was on the number of rooms because that would determine the economics of project He stated that he relied on architects and engineers to handle these matters. Subsequently, at some point in the fall of 1999, Mr. Capano indicated that be became aware of problems in the layout of the project. Specifically, he was advised that they had lost 30 proposed parking spaces during the construction of the hotel. It was his belie however, that, in his experience, the 30 spaces could be relocated and that

this kind of defect could be cured through a resubdivision plan that would occur later in the process. Mr. Capano testified that he only became aware of the square footage discrepancy in the spring of 2000. Moreover, he testified that the discrepancy was due, in part, to the reversal from 150 single rooms and 41 suites (proposed) to 150 suites and 41 single rooms (actual), as well as the enclosure of a proposed outdoor swimming pool.

Mr. Capano also testified concerning the feasibility of removing portions of the hotel to comply with the original square footage limitation. The evidence illustrated that the hotel could not survive financially if that occurred. Evidence was introduced to demonstrate that the hotel would have hero more successful in t ha short-term had the 118,805 square foot hotel actually been built. The purpose of this evidence, from the applicant's point of view, was to illustrate that there was, in fact, a financial disincentive to intentionally build the hotel larger than permitted by the record plan and that unless a solution which did not involve demolishing or permanently sealing of a portion of the hotel were reached, the applicant would suffer significant economic harm.[4] He also indicated that had the square footage discrepancy been discovered early in the process, it might have actually been "a blessing," from a cost standpoint, for the development of this project. Mr. Capano was subject to questioning by the Board, as well as by the Department of Land Use.[5] On examination, Mr.

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[4] Indeed, the hotel manager, Jim Hunt, testified that the amount of business that had already been hat due to the hotel's delayed opening exceeded $1,000,000. The applicant testified that over $21,000,000 had been invested in the project.

[5] The applicant objected to the fact that Mr. Capano, as well

Capano maintained that he did not focus on the square footage limitation on this project. He testified that he was aware that the building was going to be in excess of 150,000 square feet, based, in part, on the cost of materials, however, he believed that he was entitled to build a building that was this size and that he could seek the appropriate building permits to reflect this. He further maintained that he was not required to bring to the County's attention the discrepancy from the record plan discovered in the fall of 1999 until it was appropriate to submit a resubdivision plan Mr. Capano acknowledged that there was a time that be must have been aware of the square footage limitation and that it was his agents who were developing this plan and who submitted the building permit application to the County for permission to build 155,480 square feet.

The architects were next to testify. Joseph Chickadel was the architect originally retained to design this hotel. He testified that the only parameters Mr. Capano provided to him were that the hotel was to accommodate 195 rooms, plus amenities. He testified-that he was never provided, nor did he seek, information regarding what was permitted by the record plan He testified that the developer, not the engineer, directed him in his work and that he relied on the developer to transfer information to the engineer. Mr. Chickadel testified that had he remained on the pro-

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as the applicant's other witnesses, were subject to cross-examination. It was the Board's opinion, however, that the denial of the ability to cross-examine witnesses would be a violation of due process. *See e.g., Blue Cross Blue Shield of Delaware, Inc v. Elliott,* Del.Super., 479 k2d 843, 851 (1984). *Joseph v. Board of Adjustment of Sussex County,* Del.Super., CA 95A-09-004 & 005, Graves, J. (September 6, 1996).

ject, the displacement of parking by support columns would have triggered, in his mind, the need to reexamine the plan for record plan compliance. He never received any communication from the developer that his plans did not comport with the requirements of the record plan, nor did be ever communicate directly with the engineer. Mr. Chickadel did acknowledge, however, that he most likely received a copy of the preliminary site plan for the project, a plan that contained the 118,805 square foot limitation.

Kevin Wilson of Architectural Alliance testified that he became involved in the project after Mr. Chickadel. His job was to finish the construction plans prepared by Mr. Chickadel, which were approximately 40-50 pages of detailed drawings. He also testified that he was focused on the room count and that he was never aware of the square footage limitation. While he did perform code research, he did not research the record plan.[6] Mr. Wilson acknowledged that his firm requested the building permit for 155,480 square feet and that a square footage calculation was done for that purpose.[7] Mr. Wilson acknowledged that he would typically examine the record plan in the course of designing a project, however, in this case, he did not. He acknowledged, however, that a copy of the approved record plan was in his company's file.

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[6] Mr. Wilson did acknowledge that, bad he been Involved in the project from the beginning, it is likely that he would have reviewed the record plan documents in the course of creating his design.

[7] Robert Reid, the Individual who signed for the permit, is no longer employed by Mr. Wilson's firm and was not called to testify in this matter.

Thomas Prusak, the project engineer, provided additional testimony. Mr. Prusak was primarily responsible for the creation and processing of the record plan. He testified that he worked from the design of a full-service hotel run by Howard Johnson's. He testified that parking for the Radisson was calculated solely on the number of moms and employees because that is what the Code then required. It was his position that parking for accessory uses did not need to be broken out until the Code was amended in 1993.[8] He testified that Mr. Capano provided the number of employees (12 for a full-service hotel with a banquet room, restaurant, bar and 195 rooms) to him. He acknowledged, however, that the accessory uses proposed for the hotel were not depicted on the plans submitted to the County. Mr. Prusak testified that the record plan (with the 118,805 square foot limitation) was provided to both architects at their request. Mr. Prusak next discussed each of the variance requests. Concerning the variance for the loading

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[8] The issue of parking was hotly contested by the Department of Use The Department's representative testified that the Code has always required that parking for accessory rises be broken out to arrive at a total parking figure. As support for this preposition, the Department produced approximately 30 record plans from hotels constructed in New Castle County since 1967 that all depicted parking calculations for accessory uses broken out from the parking required for the rooms. As to why the plan, as shown, was approved, the Department testified that unless the accessory uses are depicted on the record plan, the Department would have no basis to challenge the proposed parking, let alone raise the issue. While these uses may have been tentatively identified on the concept plan shown to County Council during the rezoning process, they were not required to be depicted on a plan until the submission of the exploratory plan. An absence of accessory uses on the exploratory plan would indicate, according to the Department, that no such uses were intended.

dock spaces, Mr. Prusak could not supply a rationale as to why only one loading space was provided other than that was the way the architect designed it. The setback and opacity variances were needed to accommodate requirements that were not in the Code in 1990, and, thus, the opacity and setback requirements were not incorporated into the record plan. He also indicated that his firm had not reviewed the landscape plan to determine whether compliance with the plant unit requirements could be obtained.

Mr. Prusak, on cross-examination, acknowledged that he had pointed out to Mr. Capano on more than one occasion that discrepancies between what had been built and what was depicted on the record plan would have to be addressed by additional submissions to the County. These areas included the elevation of the building, the loss or relocation of parking, and the building's footprint. He confirmed Mr. Capano's reluctance to reference the approved lines and grades plan for this site He also testified concerning as-built drawings he prepared in June of 1998. These as-builts, which were prepared prior to the time construction commenced at this site, depicted that the footprint of the building was approximately 4,000 square feet larger than what was permitted by the record plan. He also indicated that he or someone from his firm likely communicated this information to Mr. Capano. Finally, there was some consensus that once the plans revealed that the area above the pool was to be enclosed, it should have triggered warnings that the building plans might not match the record plan.

The applicant's last witness was Eric Baum, a hotel appraiser.[9] Mr. Baum's firm had been involved in evaluating the hotel since 1990 for the bank that financed the project. Mr. Baum characterized this hotel as "suburban," with higher occupancy rates during the week as opposed to on weekends. Under this categorization, the hotel would require between 1.2 and 1.4 parking spaces per room He asserted that this ratio correlated with the number of spaces provided by other hotels in the area. He indicated that it was his opinion, however, that this extra parking (over what already exists) would not be necessary during the early years of the hotel's operation. Mr. Baum also testified that, in this industry, the focus would be on rooms, not square footage. He indicated, however, that be would make his clients aware of such figures prior to any significant investment in the project.

A number of members of the public offered testimony in support of and opposed to, the variance requests. A number of individuals employed by the Radisson tes-

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[9] James Hunt, the General Manager of the hotel, also testified. A large part of his testimony was devoted to the amount of business lost due to the delayed opening of the hotel, as well as to the generosity of Mr. Capano and Mr. Vietri and their relationship with their employees. He did acknowledge, however, that there Were 108 (not 12) employees on the hotel's roster. Mr. Hunt also indicated that it was his opinion that they had insufficient parking to accommodate the uses at the site but that he did not believe they needed 325 spots, as most of his guest would likely be arriving via cab or corporate shuttle and because a large number of employees would utilize public transportation (even though the nearest bus stop was a significant distance away). He did acknowledge that the capacity of the banquet room was between 175-200 people. The Fire Marshal's capacity load for the various amenities is 819.

tified that they would like to open the hotel and return to work. Several of these employees provided information regarding the number of employees within the various classifications of the hotel, as well as their use of public transportation. A number of residents from the development of Lea Earn Farms testified regarding their less than satisfactory dealings with one of the project's developers, Mr. Vietri. Three witnesses voiced their concerns regarding the environmental impact this project may have on the riparian buffer and the floodplain. Finally, the Delaware Hotel & Motel Association, of which the applicant is a member, offered what could fairly be characterized as opposition to these variances. The subject of its testimony included both the competitive balance of the industry and the integrity of its members.

The Department of Land Use, through its General Manager, Shawn Tucker, Esq. presented the bulk of the County's position on the application. In addition to cross examining those witnesses called by the applicant, the Department gave a lengthy presentation in opposition to the variance requests. This presentation centered on two primary arguments: self-created hardship and a lack of good faith. The Department first walked the Board through the various stages of this project, including the rezoning, record plan approval, site review and building permit approval The Department indicated that the three processes are mutually exclusive. At rezoning, the developer will provide Council with a concept of what is proposed for development, however, the developer is not required to commit to anything specific. At record plan, the plan ultimately approved provides the legal limit of what the developer is entitled to build (here, this limit was 118,805 square feet). At

site review and building permit application, the developer submits for review information necessary for the issuance of the building permit. According to the Department, it is not, at this stage, required to examine the record plan to ensure compliance,[10] and, in fact, this was not done in this case. During a preconstruction meeting on July 9, 1998, however, Mr. Capano was informed of the need to alert the Department to any changes to the project prior to implementation and certificates of occupancy being issued. Additionally, during this timeframe, despite submitting an application for a building permit for 155,480 square feet, Mr. Capano signed a sewer agreement and site development construction agreement. Each agreement indicated that 118,805 square feet would be built. Moreover, the Department relied on sealed architectural drawings at the time it issued the building permit.

The Department also provided the Board with a series of documents designed to illustrate the knowledge that was possessed (or must have been possessed) by Mr. Capano and his agents regarding the square footage limitations on the record plan and this building's lack of compliance with those limitations. Many of these documents were introduced during the course of the cross-examination of the applicant's witnesses.[11] The Department also introduced

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[10] The applicant may have inadvertently conceded agreement with this point by pointing to prior Code sections, which apparently required the Department to ensure code compliance. The Code under which this plan was processed did not have such a requirement.

[11] These included the sewer agreement site construction agreement, 6/98 as-built, the preconstruction meeting memo, the 2/00 letter from the engineer advising the applicant of the requirement to file a resubdivision plan, and a 3/00 letter from

transmittal sheets that indicated that the developer received 12 copies of the record plan in October of 1997, prior to the commencement of construction. The Department also produced several appraisals of the hotel, which indicated that the appraiser was aware of the square footage limitation in the record plan but that the developer had advised him that the "correct figure" was 156,000 square feet. Lastly, the Department introduced, during a subsequent cross-examination of Mr. Capano, several copies of a water capacity letter from Artesian Water. This letter was received from two different sources, Artesian Water and Republic Bank, the lending institution for this project. The version of the letter produced by Artesian indicated capacity was available for 118,800 square feet. The identical letter produced by the Bank contained the number 155,000 in place of 118,000. The fax transmittal numbers on this second letter indicated it had been sent from Artesian Water to Mr. Capano and from Mr. Capano to the Bank. It was the Department's position that the letter was altered between the time it left Artesian and arrived at the Bank Mr. Capano denied this allegation and argued that no expert evidence was offered to prove that the letter was altered.

The applicant's rebuttal focused upon showing that the lack of compliance was not intentional and offering a solution to the noncompliance that exists. The applicant also argued estoppel. On the estoppel issue, in addition to raising the factual issues discussed in *DiSabatino v. New Castle County,* Del.Ch., C.A No. 12714, Jacobs, V.C. (March 28, 2000), the applicant

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the engineer advising Mr. Capano of the need for the filing of a new lines and grades plan due In the change in the building's elevation.

brought several plans to the attention of the Board where restrictive notes guide the development of the project. In at least one of those projects, a limitation on building permits may not have been adhered to by the Department. The inference appeared to be that the County had been remiss in its responsibility for assuring developer adherence to Code-mandated responsibilities, therefore, it should be estopped from seeking retroactive enforcement in this case, where, the applicant argued, the same thing had occurred. The applicant also cited prior versions of the Code which appeared to shift to the County the responsibility for ensuring that what was requested on the building permit comported with the legal limits reflected on the record plan. The County argued that the Code had been changed by the passage of the UDC to return this responsibility to the developer. Moreover in most of the instances cited by the applicant, the issues raised were prospective in that the development had not attained a level where any of the notes became relevant.

The applicant, through Messrs. Capano, Prusak and Baum, also offered a proposed solution to address the parking shortfall. This proposal included the construction of a parking deck at the site to accommodate approximately 50 additional spaces, as well as the valet parking on a gravel lot across the street from the hotel. Deed restrictions would also be placed on the parcel owned by the applicant across the street to restrict future development. The applicant did request, however, that a phasing agreement regarding parking be reached between the County and the applicant such that it could open prior to the additional parking being provided. Essentially, this agreement would tie room occupancy and banquet usage so that no large events or banquets could be

held at the facility if room occupancy exceeded 50%. There were numerous problems with the proposal, however, that became apparent during the hearing. These problems included the need for a rezoning and floodplain approval to use the parcel across the street for parking, the potential need for additional variances if a parking deck was constructed, and the virtual unenforceability of the monitoring arrangement proposed by the applicant. The applicant also suggested the imposition of a monetary penalty for the applicant's violation of the record plan's requirements; however, there was no authority suggested regarding the Board's power to do this, nor did the Board feel that it had the ability to impose fines.[12] The applicant also asserted that the monetary losses it has suffered to date, in excess of $1,000,000, should be a sufficient penalty for its transgressions.

The legal issues are the exceptional practical difficulty test for area variances and the equitable estoppel argument advanced by the applicant Subsumed within the exceptional practical difficulty analysis is the Department's argument that the variances should be denied on the basis of self-created hardship. This opinion will discuss each of these arguments in turn.

The legal standard for equitable estoppel was established in *Miller v. Board of Adjustment,* Del. Super, 521 A.2d 642 (1986); *DiSabatino, supra* Equitable estoppel is established where the applicant can demonstrate that, while acting in good faith upon the

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[12] One could imagine the difficulty presented by such power. Indeed, it could reasonably be argued that the ability to impose fines, especially those offered by an applicant, would simply be a way to "buy" a variance.

affirmative act of government, he made expensive and permanent improvements to his property. *Miller,* 521 A.2d at 645-46. The applicant must also demonstrate that equities in the matter tip in his favor.[13] *Id* The biggest stumbling block in this case for the applicant is the good faith aspect of this analysis. It was apparent to a majority of the Board from the outset that the applicant had no intention of adhering to the square footage limitations contained on the record plan. The applicant acknowledged that he had to have been aware of the square footage limitations at some point, however, this limitation never factored into his considerations for the project. There is evidence in the record to indicate that the applicant (or his agents) was repeatedly given the opportunity to discover the discrepancy between the record plan and the proposed building size. Many of these opportunities occurred prior to the time construction commenced when, by the applicant's own admission, it would have much less expensive to bring the building into compliance. Moreover, there was evidence submitted to suggest that the developer was aware of the discrepancy and took affirmative steps to conceal the discrepancy from third parties. In particular, the Artesian Water letters (with the changed square footage numbers) and the representation in the HVS appraisal that the developer had communicated to it that, despite the record plan's square footage limitation of 118,805, the "correct figure" was 156,000 square feet, are illustrative of this point. Both of these

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[13] The companion doctrine of "honest error" may also be applicable in estoppel cases, especially where the illegal issuance *of* a building permit is alleged. *Miler,* 521 A.2d at 646. As with equitable estoppel, however, there must be honesty and good faith on the part of both the county permitting official, as well as the developer.

representations occurred prior to the time construction commenced and, according to the majority, would suggest that the applicant was not acting in good faith.

The applicant relied on *DiSabatino* and *DMDY, LP. v. Board of Adjustment of Sussex County,* Del.Super., C.A.No. 92A-10-005, Lee, J. (March 16, 1994). Each of these cases is distinguishable. In *DiSabatino,* the plaintiffs were third-party purchasers of the lots that were the subject of the dispute. With the issue in the matter focused on the illegal subdivision of a parcel of land over restrictions contained on the record plan, the plaintiffs' lack of connection to the subdivision process insulated them from a good faith standpoint. Additionally, in *DiSabatino,* the County acknowledged its responsibility for ensuring that the record plan for the subdivided lot was in conformance with the record plan for the entire development. Indeed, the County planner in that matter acknowledged that he had, in fact, reviewed the record plan for the subject development and overlooked the restrictive note that would have prohibited the challenged subdivision. In the present matter, on the other hand, the applicant has been involved with the project from the outset, indeed, he is the developer of the hotel. To that end, the Board specifically found that he had knowledge, or was charged with knowledge, of the restrictions on the record plan. As such, he is not cloaked in the innocence that was afforded to the *DiSabatino* plaintiffs. Moreover, in the present matter, the County denied having an affirmative obligation to check the record plan for conformance with the building permit application. In fact, the County, through the Land Use Department, specifically denied that its permit technician reviewed the record plan. As such, there was no concession on the part of the government that was present in *DiSabatino.* In

DMDY, the issue focused on a disputed interpretation placed upon street setbacks at the time a building permit was issued. In this matter, there was no dispute as to the extent of the developer's legal authority to build. He simply disregarded it. As such, the applicant did not act in good faith and, thus, can not succeed under the *DMDY* analysis.[14]

The exceptional practical difficulty analysis in this matter was, in the majority's opinion, decided by the issue of self-created hardship. The applicant correctly pointed out that the self-created hardship doctrine is only a bar in use variance cases. *Dexter v, New Castle County Board of Adjustment,* Del.Super., C.A.No. 96A-03-033, Toliver, J. (September 17, 1996). In an area variance case, however, the self-created aspect of the hardship is a factor for the Board to consider in its evaluation of the *Kwik-Check* standards. The self-created hardship cases are generally separated into two categories. There are those cases, like *Dexter,* where the self-created aspect of the variance request has not resulted from actions of the applicant. In *Dexter,* the owner sought to use the property as it had been utilized in the past. The neighbors' objections to the use rang hollow when it was shown that they had tolerated a similar use in the past. The Court noted that every variance application has some aspect of self-created hardship in it, however, where the owner has done nothing affirmatively to cause that hardship (other than, perhaps, purchasing the property), it should not be a bar to seeking relief. *Dexter is* to be contrasted with *Weaver v. New Castle County Board*

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[14] Even if the Board was convinced that the equitable estoppel argument had merit in this instance, it would likely only affect the square footage *variance.*, as the other variances would then be viewed as by-products of a permissible addition to the project.

of Adjustment, Del.Super., C.A.No. 90A-07-10, Toliver, J. (October 28, 1991). In *Weaver,* the Court found self-created hardship where the developer mistakenly sited his house on a lot 12.2 feet into the side yard setback. The developer acknowledged his mistake and sought relief through a variance. The Board and the Court rejected the request, noting that there was nothing inherent in the property that prevented the developer from complying with the zoning code. Instead, it was the developer's own affirmative misstep that created the need for a variance and this was insufficient to justify relief through a variance. Indeed, the Court noted that to award relief under this scenario would encourage builders to ignore the applicable zoning regulations if they thought compliance could be achieved through the back door.

After analyzing the facts in the present matter, the majority of the Board is convinced that this case is controlled by the decision in *Weaver.* Mr. Capano has repeatedly acknowledged that the need for the requested variances arose because of his failure to adhere to the restrictions contained on the record plan. Moreover, the witnesses who testified on his behalf acknowledged that there was no restriction inherent in the land that would have prevented him from building the structure depicted on the record plan (i.e. 118,805 square feet). Thus, the only reason for the variances was that the applicant built his building 39,000 square feet larger than permitted by the record plan, which, in turn, requires proportional compliance with the Unified Development Code. To approve the variances under these circumstances would, as the Court in *Weaver* feared, do nothing more than encourage builders to ignore the County's zoning restrictions, safe in the knowledge that the Board of Adjustment would grant relief In this mat-

ter, the extent of the self-created hardship is such that the Board cannot retroactively sanction the significant violations of the zoning code that have occurred. In so doing, the Board does not ignore the significant financial investment that has been made in this case. To assert, however, the size of the investment as justification for the award of a variance equates with trying to "buy" a variance. If this were sufficient to meet the economic hardship factor discussed in *Kwik-Check,* it would again encourage substantial investment in projects that do not adhere to the restrictions in the zoning code on the basis that the investment could guarantee a variance.[15]

Lastly, the Board offered some specific comments regarding the applicant's failure to meet the requirements for a variance found in *Kwik-Check,* as well as § 31.451 of the U.D.C. The majority of the Board had particular concerns regarding the requested parking variance. It was abundantly clear from the presentations at the hearing that there was a shortfall in the amount of parking provided at the site. The applicant conceded that the project had less parking than required by the Code. While the applicant argued that these deficiencies could be addressed, the proposal offered fell significantly short of being a firm commitment. As was discussed at the

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[15] In the past, when the Board has considered the economic factor discussed in *Kwik-Check* the focus is on an applicant's claims the requested variances are necessary to maintain a competitive balance or even economic viability. In this instance, while there were arguments focused on the economic well being of the hotel investors, none of these issues were tied to maintaining a competitive balance or a competitive economic balance. Instead, they were tied to a realization of the economic risk associated with constructing a structure in violation of the zoning code.

hearing, the proposal was contingent upon a rezoning, floodplain approvals and potential variances. Moreover, the proposed phasing agreement, with use of the banquet facilities contingent upon room occupancy was, essentially, unenforceable, due to the level of monitoring that would be necessary to ensure compliance. Absent a firm parking plan, the site was left with an admitted shortfall of parking that could pose significant hazards. Unlike other facilities discussed at the hearing, there are no surrounding commercial properties that possess excess parking to be utilized by hotel patrons. As such, the only alternatives would be roads which border an off-ramp from 1-95 or office parking lots that are a significant distance away and would require traversing Airport Road (a road which is unlit and has no sidewalks) to get to the hotel. Either alternative would pose significant traffic risks and safety concerns.

The Board also expressed concern with the applicant's deficiencies in the area of landscaping. While sympathetic to some of these, in particular, with the required landscape buffer along a swamp, it was apparent that the applicant had not attempted to achieve proportional compliance with the UDC in these areas. Indeed, they conceded that it might be possible to meet these requirements, however, they never examined the plan to determine if this could occur. Given the applicant's lack of investigation and analysis in these areas, the Board could not conclude that the exceptional practical difficulty test had been met. The same concerns were also expressed regarding the intrusion into the riparian buffer area and what protections would be in place to protect the riparian areas. In short, the Board's concerns were generated by the applicant's statements that they were required to achieve proportional compliance

with the Code, yet, this was apparently not possible because they had already built the structure that created the need for the variances in the first place. Such circular reasoning only highlights the self-created hardship aspect of this application. Finally, the Board also felt that the nearly 40,000 square foot addition to the record plan structure was not minimal, and that the only hardship demonstrated by the applicant was that it was already built As the applicant conceded it was possible to construct the building depicted on the record plan, the Board found that exceptional practical difficulty with regard to this variance had not been shown.

In conclusion, the Board votes to deny the requested variances. The requested dimensional changes are not minimal and the harm to the applicant if the variances are denied would not be greater than the probable effect on neighboring properties, and the community at large, if the variances are granted. The granting of these variances would cause substantial detriment to the public good, and would substantially impair the intent and purpose of the zoning code.

VOTE: 6-0 (Deny Applicant's arguments based upon equitable estoppel: Marconi, Clark, Hardman, Koyste, Kellam, Rolleri)

VOTE: 5-1 (Deny Variances 2, 3, 4 & 7: Clark, Koyste, Kellam, Hardman, Rolleri; Grant: Marconi)

VOTE: 4-2 (Deny Variances 1, 5 & 6: Clark, Koyste, Kellam, Rolleri; Grant Marconi, Hardman)

VOTE! 4-2 (Deny Variance 9: Koyste, Kellam, Rawl, Hardman; Grant: Marconi, Clark

VOTE: 3-3 (Automatic Denial) (Deny Variance 8: Karate, Kellam, Rolleri; Grants Marconi, Clark, Hardman)

BOARD OF ADJUSTMENT
OF NEW CASTLE *COUNTY*

/s/ Thomas C. Marconi
Thomas C. Marconi
Chairman

NOTE: This decision may be appealed to the Superior Court by any person aggrieved by ft within 30 days of its filing in the office of the Board of Adjustment.

APPENDIX H

Amendment 5 of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14 of the United States Constitution

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any

of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX I

[LOGO]

Department of Land Use

NOTICE OF DECISION

REFERENCE: Application 01-0940-A

DATE DECISION FILED: September 28, 2001

APPLICANT: KENNETH L. BRENNAN
L/O FRANK E. ACIERNO
4737 Concord Pike
Wilmington, DE 19803

PUBLIC HEARING DATE: September 13, 2001
DATE OF DECISION: September 13, 2001

REQUESTED: Applicant requested an Area variance from the maximum height of 55 feet (under M-1 zoning) to maintain a portion of a building 59.8 feet high; 107 Browns Lane, Newark, CR zoning; CD 1; Tax Parcel Id. 09-030.00-002.

The Board of Adjustment may grant a variance from the area or dimensional requirements of the County Code where it finds the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code applicable to the subject property.

The Applicant's property is part of a retail mall currently in the advanced stages of development The Boscov's store is the true applicant in this matter, given that it is the Boscov's building that was constructed too high in one location. The construction of this building is governed by the prior zoning code, as such, the 55 foot, M-1 height limitation applies as opposed to the current 50 foot limitation for CR

zoning. The intrusion in this instance is limited to one rear portion of the store. The applicant represented that the additional height did not translate into a additional square footage for the store. Moreover, the area where the intrusion exists abuts commercial/industrial property owned by Connective. The nearest residential properties are on the opposite side of the lot and are not impacted by this small intrusion. Indeed, due to the grade of the parcel, the additional height would not be noticed. This increased height appears to be the result of an honest error by the applicant when it designed the project and submitted its plans. Indeed, it was not discovered until a late inspection by the County. The applicant represented that the cost of correcting this minor intrusion would likely reach into the millions of dollars.

The Board votes to grant the requested variance. The requested dimensional change is minimal and the harm to the applicant if the variance was denied would be greater than the probable effect on neighboring properties if the variance is granted. The granting of this variance will not cause substantial detriment to the public good, nor will it substantially impair the intent and purpose of the zoning code.

VOTE: 4-0-1 Grant (Kellam, Koyste, Rolleri, Hardman; Remise: Clark)

BOARD OF ADJUSTMENT
OF NEW CASTLE COUNTY

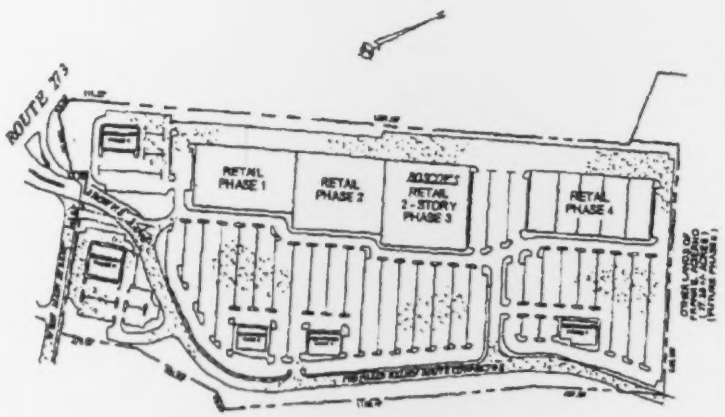
/s/ Christopher Koyste
CHRISTOPHER KOYSTE
Chairman

NOTE: This variance is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the Division of Development and

Licensing prior to construction or establishment of the use. This decision should be kept in a safe place with the property deed. This decision may be appealed to the Superior Court by any person aggrieved by it within 30 days of its filing in the office of the Board of Adjustment

NOTE: A variance becomes void if the variance is not put into effect within a two (2) year time period from the expiration of the appeal period following the date of filing this decision.

PUBLIC HEARING DATE: 09-13-01 ZONING: CR APP. NO 01-3940-A
COUNCILMANIC DISTRICT: 1 HUNDRED: White Clay Creek TAX PARCEL: 09-030.00-002



REQUIRED: MAXIMUM BUILDING HEIGHT OF 35 FEET
(UNDER PREVIOUS AC ZONING)
PROVIDED: A PORTION OF THE BUILDING WILL BE 65 FEET HIGH

BOARD OF ADJUSTMENT
NEW CASTLE COUNTY, DELAWARE

Applicant: Christiana Town Center, LLC
Address of Subject Property: 107 Browes Lane
Newark, DE

Applicant seeks: VARIANCE: Maximum building height
OTHER:

DECISION: Grant
DATE OF DECISION: 09-13-01 SCALE: 1" = 150'

NCC 02065

[Logo]

Department Of Land Use

NOTICE OF DECISION

REFERENCE: Application 02 0214-A

DATE DECISION FILED: March 27, 2003

APPLICANT: DR. ITALO V. AND
CETTINA MONTELEONE
1813 Marsh Road, Suite A
Wilmington, DE 19810

PUBLIC HEARING DATE: Feb. 27, 2003

DATE OF DECISION: Feb. 27, 2003

REQUESTED: Applicant requested an area variance from the required 40 foot street yard setback to maintain an, office building 28 feet from the Milltown Road. Area variance from the required 40 foot rear yard setback to maintain an office building 19 feet from the westerly property line. Variance from the 10 foot paving setback to maintain 0 feet along the westerly property line. Variance from the 0.4 opacity along a collector street to maintain 29 feet from the southerly property line. Variance from the 0.2 opacity to maintain 0.1 opacity along the easterly property line. Variance from the required 0.23 (4248 sq ft) maximum gross floor area ratio to maintain 0.26 (4832 sq ft) variance from the required 22 parking spaces to maintain 10 parking spaces. Certification and Mitigation of a non-conforming use to convert an office building from a nonconforming to a conforming use. 1303 Milltown Road, Wilmington. Tax Parcel No. 08-038.30-062. Zoning NC 6.5. a) 3.

The Board of Adjustment may grant a variance from the area or dimensional requirements of the County

Code where it Brit; the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code applicable to the subject property.

The Board of Adjustment may confirm the non-conforming status of a structure or use if the applicant establishes that the use in question was created before the advent of zoning in 1954 and that such use has continued without interruption since that time.

To approve a mitigation of a nonconforming use under U.D.C. § 40.08.430, the Board of Adjustment must consider the following:

A. The applicant must demonstrate that the use has minimal non-compatibilities that have been integrated into the neighborhood's function. Factors to evaluate this criterion include:

1. That the neighborhood residents patronize or are employed at the location of the use.

2. That management practices eliminate problems such as noise, waste materials, competition for on street parking, or similar conflicts.

3. Thai the use has no history of verifiable complaints.

4. That the use has been maintained in good condition or that the nonconformity represents a disincentive for such maintenance.

B. The Board of Adjustment shall review the application and recommend in writing any conditions relative to the expansion of buffer yards, landscaping, or other site design. The review may also contain use limitations believed necessary to address any con-

cerns that, as a conforming use, it may become a nuisance.

C. The Department shall submit a list of all the non-conforming conditions of the property to the Board of Adjustment.

D. The Board of Adjustment shall first determine whether the use is generally integrated into the neighborhood and any adverse impacts. Upon a finding that the use is integrated and has only minimal adverse impacts, the Board of Adjustment may grant the use and attach conditions as it deems necessary to ensure that the use remains an acceptable use.

E. Sign mitigation shall not be permitted under any circumstance.

The applicant's property is located on Milltown Road in Wilmington. The two-story office building on the property exists today *as* it did when the property was purchased by Dr. Monteleone in 1976. The professional office use that was allowed under the former R-4 zoning became nonconforming when the zoning was converted to NC6.5 in 1997. The owner seeks a certification and mitigation of the nonconforming use to make it conform to the Code. The 1970 Record Plan for Cynwyd Club Apartments, on which this parcel is depicted as Parcel II, specifically represents the structure as a "proposed office building". The continued maintenance of an office use in the building since 1997 was established through testimony before the Board. Together with letters from neighboring property owners, the applicant's testimony also established that the use was well integrated into the neighborhoods function.

Aside from the certification and mitigation of the nonconforming use, the applicant also requested several variances. AU of the variances are to maintain the site as it presently exists. While the original record plan called for 2,500 s.f. of office space in the building, with *an* additional 500 s.f. basement, a 4,832 s.f. structure was actually built Since the building does not conform to the original record plan, Dr. Monteleone seeks to record a new plan that accurately depicts the site. The plan cannot be recorded, however, without the Board first granting variances for those property features that do not meet the Code requirements.

Two variances focus on the front of the building the required setback when the building was constructed was 30 feet. A corner of the building was built slightly over this line. The U.D.C. now requires a 40 foot setback. In addition, the Code requires a bufferyard opacity of 0.4 adjacent to the right of way.

The building lies within the 40 foot rear yard setback. The intrusion is 21 feet at its greatest, and recedes dramatically from that point, given the odd shape of the property. Where paving directly abuts the westerly property line, the applicant requests a variance from the required 10 foot paving setback. With respect to the other side lot line, the pavement intrudes 5 feet into the minimum 15 foot buffer for a 0.2 opacity, resulting in an opacity of 0.1.

The site is also 12 parking spaces shy of the required 22 spaces. The existing number of spaces, however, was sufficient to *meet* the Code when the plan was originally recorded. Several spaces just beyond the westerly property line, while not technically attributable to this use, in actuality serve the use during the day. The owner committed to restricting the use

of the property in the future, so that when the current tenants leave the building, the building would not longer be used as a medical office, which would further alleviate any parking problem. Finally, the building exceeds the maximum square footage allowed on the site by 584 square feet.

The Board votes to grant the requested variances. The site's features are familiar to neighboring property owners and civic associations, who had no objection to the application. The requested dimensional changes are minimal, in light of existing neighborhood conditions, and the harm to the applicant if the variances were denied would be greater than the probable effect on neighboring properties if the variances were granted. The granting of these variances will not cause substantial detriment to the public good, nor will they substantially impair the intent and purpose of the zoning code. The Board conditions the variances on the building not being used for medical offices once the current medical tenant leaves the *site.*

VOTE: 6-0 (Grant: Clark, Reda, Koyste, Ciabattoni, Kellam, Hardman)

BOARD OF ADJUSTMENT
OF NEW CASTLE COUNTY

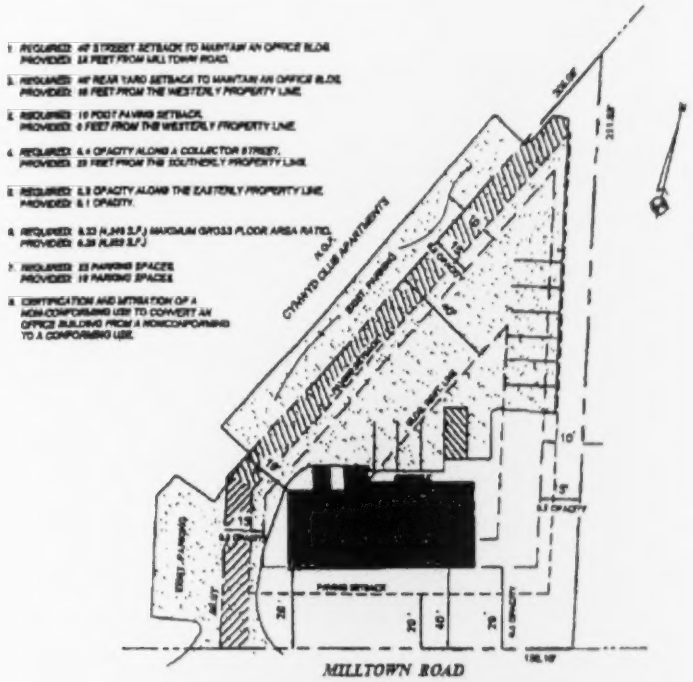
/s/ Christopher S. Koyste
CHRISTOPHER S. KOYSTE

NOTE: This variance is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the Division of Development and Licensing prior to construction or establishment of the use. This decision should be kept in a safe place with the property deed. This decision may be ap-

pealed to the Superior Court by any person aggrieved by it within 30 days of its filing in the office of the Board of Adjustment.

NOTE: A variance becomes void if the variance is not put into effect within a two (2) year time period from the expiration of the appeal period following the date of filing this decision.

PUBLIC HEARING DATE: February 27, 2003 ZONING: NC6.5 APP. NO. 02-0214-A
COUNCILMANIC DISTRICT: 3 HUNDRED: Mill Creek TAX PARCEL: 08-038.30-062



BOARD OF ADJUSTMENT
NEW CASTLE COUNTY, DELAWARE

Applicant: Dr Italo V. & Cettina Montelcone
Address of Subject Property: 1303 Milltown Road
Wilmington, DE

Applicant seeks: VARIANCE: Various
OTHER:

DECISION: Grant w/ Condition: 5 foot fence must be placed and no additional medical occupants.
DATE OF DECISION: February 27, 2003 SCALE: 1"=200'

NCC 02025

1063a

[LOGO]

Department Of Land Use

NOTICE OF DECISION

REFERENCE: Application 03-1046-A

DATE DECISION FILED. November 21, 2003

APPLICANT: GOLDEN DOVE ASSOCIATES
C/O Thomas C. Marconi, Esquire
Losco & Marconi, P.A.
1813 N. Franklin Street
Wilmington, DE 19802

PUBLIC HEARING DATE: Oct 23, 2003

DATE OF DECISION: Oct 23, 2003

REQUESTED: Applicant requests an area variance from the maximum GFA of 5000 square feet to maintain a structure including a covered entrance comprising 6402 square feet. 1101 & 1119 N. DuPont Parkway. Tax Parcel No. 10-014.30-454/468. Zoning CN. CD 1.

The Board of Adjustment may grant a variance from the area or dimensional requirements of the County Code where it finds the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code applicable to the subject property.

The subject property is located on N. DuPont Parkway in New Castle. The applicant recently renovated a building that presently houses a restaurant. The majority of the structure is over 50 years old. Plans were drawn up for an 827 s.f. addition to the front of the building, and the applicant obtained a permit from the Department of Land Use for the addition.

The resulting addition turned out to be slightly larger than allowed by the permit, due in most part to plans for a larger cold box at the rear of the building.

This discovery led to the applicant's request to maintain a structure that exceeds the permissible gross floor area by 1,400 square feet. The building was already 201 square feet larger than allowed under the UDC's gross floor area ratio standard. Almost 400 square feet of the addition is attributable to the roofed open area over the handicap ramp. The applicant theorizes that its out-of-state engineering firm may not have appreciated that the cold box had to be added to the total gross floor area for the structure. The size of the cold box has been reduced to keep under the amount allowed by the permit issued; however, the variance to exceed the gross floor area ratio is still necessary.

The appearance of the structure from Dupont Highway has been dramatically improved. The applicant submitted several letters of support from neighboring property owners.

The board votes to grant the requested variance conditioned on the covered walkway remaining unenclosed. The requested dimensional change is minimal in light of existing neighborhood conditions and the harm to the applicant if the variance was denied would be greater than the probable effect on neighboring properties if the variance was granted. The granting of this variance will not cause substantial detriment to the public good, nor will it substantially impair the intent and purpose of the zoning code.

VOTE: 5-0 (Grant Reda, Ciabattoni, Hardman, Rolleri, Clark)

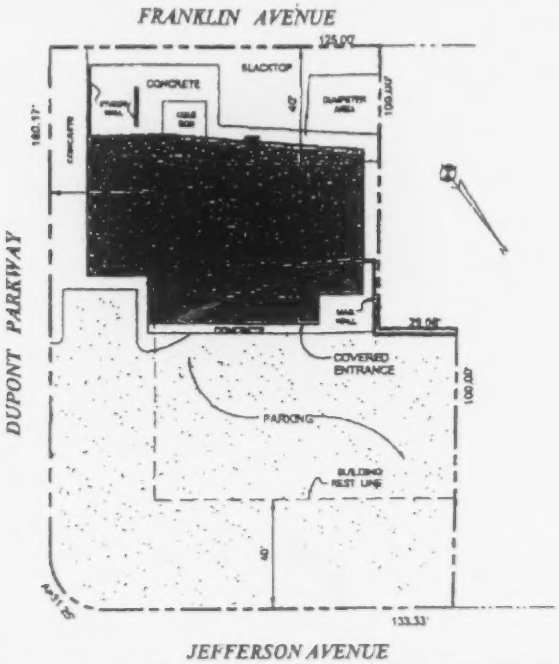
BOARD OF ADJUSTMENT
OF NEW CASTLE COUNTY

/s/ James Hardman
JAMES HARDMAN
Acting Chairman

NOTE: This variance is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the Division of Development and Licensing prior to construction or establishment of the use, This decision should be kept in a safe place with the property deed. This decision may be appealed to the Superior Court by any person aggrieved by it within 30 days of its filing in the office of the Board of Adjustment.

NOTE: A variance becomes void if the variance is not put into effect within a two (2) year time period from the expiration of the appeal period following the date of filing this decision.

PUBLIC HEARING DATE. October 23, 2003 ZONING: CN APP. NO. 03-1046-A
COUNCILMANIC DISTRICT: 1 HUNDRED: New Castle TAX PARCEL: 10-014.30-454 & 10-014.30-468



REQUIRED: MAXIMUM GFA OF 5,000 SQUARE FEET TO MAINTAIN A STRUCTURE INCLUDING A COVERED ENTRANCE.
PROVIDED: 8,402 SQUARE FEET.

BOARD OF ADJUSTMENT
NEW CASTLE COUNTY, DELAWARE

Applicant: Golden Dove Associates
Address of Subject Property: 1101 & 1119 N. DuPont Parkway
New Castle, DE

Applicant seeks: VARIANCE: Maximum GFA of 5000 square feet
OTHER:

DECISION: Grant with the condition that the entry remain open where the overhang is.
DATE OF DECISION: October 23, 2003 SCALE: 1"=40'

NCC 01738

[LOGO]

Department of Land Use

RECOMMEDATION REPORT TO
THE BOARD OF ADJUSTMENT
IN AND FOR NEW CASTLE COUNTY

APPLICATION NO. 03-0509-A

APPLICANT: Parkside V, LLC

DATE OF HEARING: January 20, 2004

REQUESTED RELIEF:

Applicant seeks the following dimensional variances from the requirements of the Unified Development Code (the "UDC"):

1. *Landscape Surface Ratio.* Reduction in the Landscape Surface Ratio (LSR) to .41 where 1.00 is required.

2. *Floor Area Ratio.* Increase in the maximum allowable gross (.50) and net (.82) floor area ratio (FAR) to allow additional gross floor area of approximately 46,302 sq. ft. where 0% expansion is permitted. The 46,302 sq. ft. consists of hotel space that was constructed in excess of the lawful amount of 118,805 sq. ft. approved on the 1990 record plan. No expansion is permitted because the entire site is located within the 100-year floodplain which requires 100% protection.

3. *Loading Spaces.* Reduction in the number of loading berths to 1 where 3 are required.

4. *Paving Setbacks.* Reduction of the required paving setbacks of 25 feet from streets to 0 feet.

5. *Bufferyard Opacity Standards.* Reduction to 0.1 opacity along streets where 0.4 opacity is required.

6. *Riparian Buffer Area.* Area variance to allow encroachments into the riparian buffer up to 84% (+)(-) 1; where 100% protection and preservation of the riparian buffer zone is required.

Applicant also pursues a Beneficial Use Appeal to (1) enlarge the footprint of the building constructed within a designated floodplain by 8,116 sq. ft.; (2) construct a surface parking lot within a designated floodplain; and (3) disturb a designated floodplain by removing 14,278 cubic yards of 5111 for the purpose of creating a net increase of flood storage capacity to mitigate the addition of fill at the Hotel Site and surrounding areas.

In the event that relief from the UDC dimensional requirements are denied in part or as a whole, Applicant requests relief from such specific requirements of the UDC pursuant to 40.31.600 that are necessary for the approval of the exploratory sketch minor land development plan (the "Parkside Plan").

DESCRIPTION:

The subject property consist of three tax parcels 10-013.00-001, 10-013.00-003, and 10.013.00-005, all located in New Castle along Airport Road near its intersection with the Route 141 off-ramp from northbound Interstate 95 (the "Property"). The postal address of tax parcel number 10-013.00-001 is 401 Airport Road and it is owned by Parkside V, LLC. It is a 3.409 acre parcel of land that is occupied by a six-story building that is intended to serve as a hotel with appurtenant site improvements (the "Hotel Site" or "Hotel"). Tax parcel number 10-013.00-003 is a

26.491 acre parcel of land owned the State of Delaware, Department of Transportation that is primarily wetlands with a small upland area. Parkside proposes to consolidate 2.481(+)(-) acres of this parcel in addition to .387 acres of right-of-way adjacent to the Hotel Site also owned by the State of Delaware, Department of Transportation (together referred to as the "State Property") with the Hotel Site to increase the total area of the Hotel Site to 6.278 acres. The postal address of tax parcel number 10.013.00-005 is 410 Airport Road and it is owned by Parkside V, LLC. It is a sixteen (16) acre parcel of land located across Airport Road from the Hotel Site and is undeveloped, predominately marsh wetlands (the "Mitigation Site"). The Property lies within the 100-year floodplain of the Christiana River. The Hotel Site is zoned Commercial Regional (CR). The Mitigation Site and tax parcel number 10-013.00-003 are zoned Industrial (I).

BACKGROUND:

Republic Bank ("Republic") provided financing to the developer, Wilmington Hospitality, LLC ("W.H.") to construct the Hotel. Although the project was nearing completion, WH was unsuccessful in obtaining a certificate of occupancy to open the Hotel due to the numerous record plan non-compliance issues and New Castle County Code ("Code") violations. In 2000, WH appeared before this Board seeking variances from the UDC but was unsuccessful for the reasons summarized herein and more thoroughly discussed in the Board's decision dated September 29, 2000 on Application 00-0552-A. (Applicant's Exhibit E).[1] In 2002, as the Hotel sat vacant,

[1] For consistency and ease of reference, the Department shall herein refer to the Exhibits provided by Applicant. Exhibits sub-

subsidiaries controlled by Republic, Republic SPE II, Inc. and Republic SPE, Inc., took title of the Property. In May of 2003, Republic submitted an application to this Board seeking myrad variances and a beneficial use determination, (*See* Exhibit D). Before Republic's application was heard, the Hotel was sold to Park side V, LLC ("Parkside") and Park-side requested a continuance of the Board of Adjustment hearing. In December 2003, Parkside submitted a revised exploratory sketch minor land development and plan. (Exhibit 1) ("Parkside Plan"). The Parkside Plan does not conform to the 1990 record plan. Additionally, the Parkside Plan cannot be approved by the Department because it does not comply with all relevant Code provisions. Thus, Parkside filed this application for a special hearing before the Board for the purpose of requesting the relief discussed herein.

The history of this project is long but relevant to the application before the Board. In 1989, an exploratory sketch plan was submitted to the County proposing the development of the site with a hotel. During the exploratory sketch stage of plan submission, the developer of the project submitted an application to develop in the floodplain. The Department of Public Works and the Department of Planning recommended the denial of the application. The recommendations for denial were based on the fact that all of the parking would be well below the 100-year flood elevation, as much as nine feet, and cars parked in the area would reduce flood storage capacity of the

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mitted with Republic's May 2003 application are contained in Volume I and II and categorized alphabetically (Volume I contains Exhibits A-K, Volume II contains Exhibits L-W) Exhibits submitted with this application are contained in Volume III and categorized numerically (Exhibits 1-7).

site, could block culverts and drainage ways during a rain event, and would result in significant property damage to the vehicles. Regardless of the recommendations, County Council approved the floodplain application by the adoption of Resolution No. 89-413.

Also during the exploratory sketch stage, the developer made an application to revise the zoning maps to change the zoning of the Hotel parcel from M-2 (General Industrial) to C-2 (Roadside Business). The Department of Planning recommended denial of the rezoning ordinance stating that there was no rationale for eliminating the manufacturing zoning district, given the similarity of the surrounding zoning and development practices. Nonetheless, County Council revised the zoning maps pursuant to Ordinance No. 89-090 subject to certain restrictions contained in the Declaration of Restrictions recorded at the Office of the Recorder of Deeds in and for New Castle County deed record book 992, page 50. (Included in Exhibit B).

The deed restrictions provided in part: (1) the floodwater storage capacity of the site must be increased by a minimum of three hundred fifty (350) cubic yards; (2) the lowest floor level must be elevated above the 100 year flood elevation and (a) must be designed and adequately anchored to prevent flotation, collapse, or lateral movement of the structure, (b) be constructed with materials and utility equipment resistant to flood damage, and (c) be constructed by methods and practices that minimize flood damage; (3) cables must be used around the perimeter columns of the Hotel to prevent cars parked beneath the structure from floating away; (4) guests leaving their cars unattended should park under the building and leave their keys with the

Hotel staff; (5) a flood alarm system should be installed in the parking lot that is connected to a sump located in the lowest part of the parking level - the alarm must be staffed 24 hours per day; and (6) maps depicting evacuation routes to public parking facilities to avoid flood water harm must be prepared and updated annually for submission to the Department.

A preliminary plan, dated January 5, 1990, was submitted to the County on January 8, 1990. The gross floor area noted on the plan was 118,805 square feet. This figure represented the maximum floor .area permitted at law (0.80 FAR or 80% of the total site area based or building height above 45 feet in a (C2 zone). The parking rationale noted en the plan required 199 spaces - 195 spaces (1 per room) and 4 employee spaces (12 employees listed multiplied by 1 space for 3 employees). No other uses were noted on the plan and no additional parking was provided for any additional uses. The plan provided a total of 207 spaces comprised of 203 standard spaces and four handicap spaces. The Department approved the preliminary plan on February 6, 1990. A record plan submission was made to the Department on March 20, 1990. The record plan provided 207 parking spaces consisting of 202 standard spaces and 5 handicap spaces. As on previous plans, the gross floor area remained 118,805 square feet and the only use indicated on the plan was guest rooms. The record plan was approved by the Department on April 11, 1990, and recorded on April 25, 1990 at microfilm no. 10359 (the "1990 record plan" or "record plan").

On June 5, 1998, the Department received an application for a building permit from WH. The architectural drawings submitted with the building

permit application represented a six-story hotel consisting of 155,480 square feet of space. A review of the architectural drawings for building code compliance resulted in the Department issuing a building permit on July 21, 1998 (building permit no. 1953). Construction thereafter commenced.

On May 12, 2000, employees of the Department visited the site to perform a courtesy inspection at WH's request prior to the final record plan inspection. Generally, the record plan inspection is not performed until the day before, or the day of, the final certificate of occupancy inspection. In preparation of this site visit, a County inspector reviewed the record plan to ascertain site compliance. The inspector discovered that the site layout did not conform to the 1990 record plan. Problems noted included such items as: the parking lot *was* neither installed nor striped according to the record plan; the landscaping was not in accordance with the approved landscape plan; an additional entrance from Airport Road had been installed that was not shown on the record plan; the approved entrance was not constructed according to the record plan; the entrance and exit to the parking garage was different than shown on the record plan; all parking lot curbing required by the record plan was not installed; and paving and grading encroachments were noted on the south property line. During the courtesy visit, Department representatives discussed the problems with Albert Vietri and Joesph Capano, the principals of WH. At this point, the record plan discrepancies were reported to Department management. The Department immediately contacted WH to discuss the situation.

Numerous meetings were held during the next few weeks to identify the scope of the problems and determine the level of non-compliance. During this time, a complete review of the project was made by the Department Most significant was the fact that, although a maximum gross floor area of 118,805 square feet was permitted by the record plan, the site was developed with over 165,000 sq. ft. of GFA, and in excess of the 155,480 sq. f represented on the building permit Additional uses were also provided in the Hotel that were not delineated on the record plan. Those uses included large banquet facilities, restaurant and bar areas, and meeting facilities. It was also noted that considering these additional uses, additional parking would need to be provided. Due to the nature and severity of the apparent violations, the New Castle County Attorney initiated a fact-finding investigation to determine the cause discrepancies between the record plan and the as-built condition of the Hotel and site improvements.

On May 31, 2000, an exploratory sketch resubdivision plan submitted to the Department for review. "The purpose of the plan was to show a revised parking configuration to reflect the as-built site condition and to recognize additional restaurant, meeting and banquet uses. The plan was returned to the applicant pursuant to U.D.C. § 31.112(C)(5) for substantial noncompliance as it was learned that substantially more GFA was constructed than was approved. On June 12, 2000, an exploratory sketch minor land development plan was submitted for review. The purpose of the plan, in addition to those above, was to legitimize the additional GFA constructed in excess of the 118,805 square feet that was permitted by the 1990 record plan. Neither a parking structure nor additional parking area was offered on

the plan. The Department issued a draft response to the submission on June 21, 2000 wherein the areas of Code non-compliance were identified.

In July 2000, the developer appeared before this Board seeking variances. Among the variances was one requesting that the number of required parking spaces be reduced from 325 to 202. The hearings involved two nights of testimony, cross-examination, and document analysis. Mr. Capano maintained throughout the hearings that he did not build the extra square footage intentionally. He also provided six witnesses who attempted to rationalize how a building could be constructed in excess of the record plan site capacity limitations. During the hearing, the developer's witnesses also explained that the Hotel did not really need over 300 parking spaces, and that 202 spaces would be sufficient

The Department did not support the developer's variance application. The Department argued that Mr. Capano knew of the excess GFA and simply chose to build the hotel that he wanted to build, regardless of the County's land use laws. The Department provided documents to the Board that clearly illustrated that the developer did not make an honest mistake and, in fact, proceeded in bad faith and with the knowledge that the record plan and the Code were being violated. Since the building was located in the floodplain, the Department was also concerned that the site would adversely affect the surrounding area during flood events and cause other environmental problems. A major concern for the Department was that the shortage of parking would present a very real and serious safety issue if Hotel guests or employees were forced to park on Airport Road or the exit ramp of Interstate 95.

This Board issued its decision on September 29, 2000 and denied the requested variances. The Board opined that the developer failed to satisfy the exceptional practical difficulty test for area variances because the need for the requested variances arose from the developer's bad faith failure to adhere to the record plan. Thus, the Board found, granting relief from Code requirements based on self-created hardship would only serve to encourage builders to ignore the County's zoning restrictions. The Board also expressed concern that the developer had not seriously attempted to achieve proportional compliance with the UDC in areas such as landscaping and also failed to address what protections would be in place to protect riparian buffer areas. The Board was frustrated by the developer's position that the structure and parking already existed so conferring to the Code even attempting proportional compliance, was not possible.

The Board had particular concerns with the developer's requested parking variance. The Board found that there was a significant shortfall of parking provided on the site. Although the developer proposed ways the deficiencies could be resolved, none of the proposals appeared to be plausible. The Board held that absent a firm parking plan, the site was left with a shortage of parking that could pose significant public safety hazards.

After the hearings, additional information regarding the Hotel and Hotel Site was discovered. For instance, the developer failed to comply with the deed restriction that required the creation of an additional 350 cubic yards of floodwater storage capacity at the site. Instead, the developer added over 12,000 cubic yards of fill to the Hotel Site and surrounding right-

of-way thus significantly decreasing the floodwater storage capacity of the area. The developer appeared before the New Castle County Planning Board in 2001 seeking to amend the deed restrictions and proposed to mitigate by providing additional floodwater storage capacity on the Mitigation Site. The Planning Board recommended against the deed restriction change because many aspects of the mitigation proposal were too tenuous. The developer did not pursue the deed restriction change before County Council.

Significant building code violations were also uncovered. Although the building code issues are not under review by this Board, it is important to note that these issues must be resolved before a certificate of occupancy can be issued.

On December 18, 2003, an exploratory sketch minor land development plan with a rezoning was submitted to the Department by Parkside. The purposes of the plan are: to show a revised parking configuration; depict the as-built condition of the site including an increase in the existing building footprint of 8,116 sq. ft.; depict the increase of 46,302 sq. ft. of existing GFA in excess of the approved 118,805 sq. ft.; show additional Hotel uses including meeting rooms, restaurant, lounge and banquet facilities not proposed on the 1990 record plan; propose a new parking area for surface parking to be constructed on the State Property bringing the total number of surface parking spaces to 338 where 338 are required and providing 52 additional parking spaces below the structure; and, to include the adjacent 16-acre Mitigation Site for proposed floodwater storage capacity to mitigate approximately 12,000 cubic yards filled on the Hotel Site in excess of the approved deed

restrictions wherein there was to be an increase in floodwater storage capacity of 350 cubic yards. The Applicant then filed this application for the above-identified variances and the beneficial use appeal.

ZONING VARIANCES

The construction of the building and parking area in a mariner that deviates from the 1990 record plan creates the need for numerous variances. The Property is entirely within the FEMA mapped 100-year floodplain. Therefore, with a resource protection factor of 1.0 (from Table 40.10.010) the site capacity calculation will result in a maximum GFA of zero and 100 percent landscape surface area. That is, the entire 22.28 acres should be listed as floodplain in the total protected land. The maximum floor area ratio and minimum landscape Surface ration of Table 40.04.110 are therefore exceeded in their entireties.

Section 40.08.130(B)(1) requires proportional compliance with UDC standards. The Plan requires 39% adherence to the UDC's proportional compliance requirement. The exploratory sketch plan proposes to legalize 46,302 sq. ft. of GFA of "unapproved" hotel space over the previously approved 118,805 sq. ft. Thus, the UDC requires 39% compliance with: (1) the dimensional requirements of Table 40.04.110 for paving setbacks of 25 feet from streets; (2) Table 40.04.111 requirement of 0.4 opacity along streets; and (3) since this site is entirely within the floodplain, it is by definition, within the Riparian Buffer Area and subject to revegetation by § 40.10.331 with the exception of the existing building and paving.

Legal Standards

The Board of Adjustment shall hear and decide applications for a variance from the provisions of any

zoning code or regulation if all of the following are satisfied.

1. The variances sought will not be contrary to the public interest.
2. Owing to special conditions or exceptional situation, a literal interpretation of the provisions of any zoning code or regulation at issue will result in unnecessary hardship or exceptional practical difficulties to the owner of the property.
3. If the variances were granted, the spirit of the zoning code or regulation provision at issue shall be fully observed and substantial justice done.
4. Such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning code, regulation, or map.

All case law that has developed, and continues to develop, interpreting 9 Del. C. § 1352 shall be adhered to by the Board of Adjustment. In *Board Of Adjustment Of New Castle County v. Kwik Check Realty, Inc.*, 389 A.2d 1289 (Del. 1978), the Delaware Supreme Court distinguished an "area variance" from a "use variance." "[A] use variance changes the character of the zoned district by permitting an otherwise proscribed use ... whereas an area variance concerns only the practical difficulty in using the particular property for a permitted use." *Id.* at 1291. "Accordingly, given the differing purposes and effects of the two types of variance, a lesser standard of the owner's 'exceptional practical difficulties' is appropriate for obtaining an area variance." *Id.*

The Delaware Supreme Court further explained, in *Kwik-Check,* that to determine if the difficulties presented by the owner are practical rather than theoretical, and exceptional rather than routine, the Board should take into consideration:

1. the nature of the zone in which the property
2. the character of the immediate vicinity and the uses contained therein;
3. whether, if the restriction upon applicant's property were removed, such removal would seriously affect such neighboring property and uses; and
4. whether, if the restriction is not removed, the restriction would create, unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the provisions of the ordinance.

Petrucelli v. New Castle County Bd. of Adjustment, CA. No. 97A-02-009-WTQ, 1997 Del. Super. LEXIS 526, at *16, Quillen, J. (Mar. 17, 1998) (citing *Kwik - Check*).

Discussion

This situation exists because instead of building what was permitted at law, a 118,805 sq. ft. hotel with 195 rooms, WH built a 195 room hotel, added over 46,000 sq. ft. of illegal GFA, unlawfully added uses such as restaurant, banquet, and meeting facilities, and essentially disregarded the required improvements as delineated on the 1990 record plan. In 2000, the Department recommended against WH's variance requests for several reasons. The Depart-

ment relied on *Weaver* to argue that there was no practical difficulty inherent in the land, or situation peculiar to the land, that created the need for the variance requests. *See e.g. Weaver v. New Castle County Board of Adjustment,* Del. Super., C.A. No. 90A-07-10, Toliver, J. (Oct. 28, 1991). The Department stated the area variances should be denied because the variances requested were the result of the developer's unlawful conduct and self-created hardship. Additionally, the Department opined that *Kwik-Check* factors could not be met.

Now a new applicant appears before the Board and seeks variances. Unlike WH, the current Applicant is not tainted with bad faith. Thus, one of the Department's primary *objections* to the granting of variances is eliminated if it can be assured that WH's principals will not in any way be the beneficiaries of the variances, and beneficial use determination. Another major difference is with the degree of the variance *requests.* WH sought much wider relief from the Code and made minimal attempts to comply with any Code provisions. Rather than provide real parking alternatives, WH simply pursued the argument that 202 parking spaces would be sufficient. This was a major concern of the Department. However, the Applicant has addressed the Department's primary site concern—insufficient parking—by acquiring land and proposing additional parking spaces. WH also made little effort to meet bufferyard, landscaping, open spaces, street trees, curbing, and other UDC standards that protect the environment and the health safety and welfare of the community. The developer simply expected the Board to accept the site in its as-built condition. It appears that Applicant has attempted to minimize the variance

requests and will comply with UDC requirements unless there is exceptional practical difficulty.

Turning to the Kwik-Check factors, items 1, 3, and 4 of the statutory analysis are closely related and will he discussed together. Item 2, analysis of the *Kwik-Check* criteria will be discussed independently

A. Whether the variances are contrary to the public interest, violate the spirit of the zoning code, pose a substantial detriment to the public good, or impair the intent and purpose of the zoning code.

1. *Increase in Gross Floor Area.*

Site capacity analysis is the method used to determine the amount or intensity of development that can be accommodated on a specific site. It takes into consideration zoning and proposed land use, man-made and natural constraints, protected natural resources, and provides for efficient building and parking design and public infrastructure requirements. The site capacity calculations are designed for the public welfare and the UDC requires 100% compliance with site capacity issues. The Hotel Site was designed under the previous code to support its maximum site capacity—an 118,805 sq. ft. hotel and parking. It is fair to say that a project proposing this type of development in a floodplain would not be approved under today's regulations.

Applicant argues that if the 16-acre Mitigation Site were consolidated with the Hotel Site and factored into the site capacity calculation, the Property would support 845,456 sq. ft. of GFA. Republic pursued this approach but concluded that it would not be successful since the Mitigation Site is zoned I and does not warrant a rezoning to CR. Applicant also recognizes that since the Mitigation Site is located in

a floodplain, pursuant to UDC Article 5, its acreage cannot be considered for GFA ratio purposes. Applicant next argues that at such time the State Property is consolidated with the Hotel Site, including the acreage would bring the GAF ratio to .61. Unfortunately, regardless of what lands are included in the floor area ratio calculation, the Applicant still exceeds the FAR because all of the Property is constrained by the floodplain designation and cannot be considered for GFA ratio calculation purposes.

The Department recognizes Applicant's quandary. If the Property was not located in the floodplain, a much different situation would exist. For example, by adding additional lands to the Hotel Site, the site capacity would increase. If the State Property was included thus bringing the total acreage to 6.28 acres, the site could support 136,778 sq. ft. of GFA. If the Mitigation Site was included thus bringing the total acreage to 22.28 acres, the site could support 485,258 sq. ft. of GFA. But since the State Land and the Mitigation Site are located in the floodplain, the UDC does not allow recognition of the acreage for the site capacity calculation.[2] While the UDC recognizes that development in the floorplan is not desirable, the approvals to build a hotel in the floodplain exist. The

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[2] The Department takes exception to Applicant's argument that neither the Department nor the Board has consistently required applicants pursuing beneficial use appeals to simultaneously obtain relief from GFAR/NFAR and riparian buffer requirements. GFAR/NFAR calculations are simply not applicable to determining the development potential of an existing residential lot located in a floodplain. Clearly, Applicant's invitation to draw an analogy to a commercial development site that has exceeded site capacity by over 46,000 sq. ft of GFA to a single residential lot where site capacity is simply not relevant should be disregarded.

Hotel Site was located in the floodplain when County Council approved the rezoning and the record plan. Applicant has significantly increased the size the Hotel Site by acquiring the State Property and restricting the Mitigation Site from future development. It is only because the property is located in the floodplain that Parkside cannot consider the additional land in the site capacity calculations. Site capacity controls are designed to protect the proximate property owners and the entire community from over-development of a site. See § 40.05.000, Purpose. Although the additional land is located in the floodplain, the Parkside Plan provides the protection to the community that the UDC is designed to offer through its site capacity limitations.

Although it is unfortunate that the Hotel was approved to be built in the floodplain, the plan was approved by County Council 1990, by right, an 118,805 sq. ft structure could be legally located on a 3.409 acre parcel along with 207 parking spaces. When WH overbuilt the structure and provided less than adequate parking, the Department recommended against allowing any additional GFA over the 118,805 approved and this Board denied WH's request to allow the additional GFA. The Parkside Plan, however, is much improved over what WH proposed. What Parkside proposes is to locate a 165,107 sq. ft. structure on land occupying 22.28. acres. Parkside has provided all the required parking and has also provided fifty-two (52) parking spaces over the required amount. Parkside has complied with most of the UDC's requirements and seeks variances from only those provisions in which it is practically impossible to comply. Most importantly, Parkside does not appear before the Board tainted with the bad faith that cloaked WH. Furthermore,

considering the history of this site, it is unlikely that granting this variance would encourage any property owner to violate the provisions of the UDC. Based on the improvements to the plan and Parkside's diligent efforts to meet UDC requirements, it is the Department's opinion that granting Parkside's variance request to exceed the GFA ratio to legitimize the additional 46,304 sq. ft. of hotel space is for the public good and would not impair the spirit, intent, or purposes of the UDC.

2. *0.4 Street Yard Opacity and Riparian Buffer.*

County Council adopted specific standards for bufferyard, landscaping, open *spaces,* street trees, and riparian buffer protection to safeguard the environment and protect the health, safety, and welfare of the community. Implementation of these standards promotes the reduction of noise, dust, glare, runoff and sedimentation, heat, as well as improves the appearance of the site. Additionally, riparian buffer zones are required by the UDC to protect environmentally sensitive lands and resources, such as floodplains and wetlands. The elimination or reduction of the riparian buffer zone may contribute to the degradation of the ecosystems and habitats for flora and fauna. The entire Hotel Site is located within the floodplain. Wetlands surround the site and the entire site is a riparian buffer area. Granting the variances could result in increased stormwater runoff and sedimentation on adjoining properties. If the riparian buffer zone is reduced, contaminates could more readily enter environmentally sensitive areas.

The harm to neighboring property and the community from these environmental threats has not: been ignored by the Parkside Applicant has offered that

they are in discussions with Delaware, Department of Transportation to acquire additional land along the perimeter of this site. If this land is acquired, the required opacity and the street trees will be provided along Interstate 95 and part of Airport Road. Applicant has represented that landscaping will be provided along the remaining sides of the site and the area will be revegetated. Additionally, redesigned stormwater management and riparian buffer enhancements will be provided along the westerly and southerly property lines.

Based on Applicant's representations, the Department recommends in favor of the requested variances conditioned upon the Applicant's acquisition of additional !ands from the Department of Transportation to provide required landscaping, stormwater management, conservation design measures, and riparian buffer revegetation and enhancements. If these conditions are met by Applicant, the spirit, intent and purpose of the zoning code will be met and the detriment to the public good will be *de minimis.*

3. *Paving Setbacks*

Applicant seeks paving setback variances along Airport Road. The variances are necessary to maximize parking and vehicular circulation on the site. The Department recognizes the importance of maximizing parking at this site. Site constraints seriously limit parking and access configuration. It appears that Applicant has attempted to maximize parking to meet UDC parking requirements while adhering to as many UDC provisions as reasonably feasible. The spirit, intent, and purposes of the UDC will be satisfied if the Board grants this variance. Additionally, balancing the considerations, maximizing on-

site parking greatly outweighs any detriment to the public that the variances would create.

B. *Kwik-Check* Factors: Whether unnecessary hardship or exceptional practical difficulties exist.

The Delaware Supreme Court explained in *Board Of Adjustment of New Castle County v. Kwik-Check Realty, Inc.*, 389 A.2d 1289 (Del. 1978), that to determine if the difficulties presented by the owner are practical rather than theoretical, and exceptional rather than routine, the Board should take into account the following four factors.

1. *Nature of the zone in which the property lies.*

The 3.409 acre Hotel Site is zoned Commercial Regional (CR). Commercial lodging is a permitted use in the CR zoning district If Parkside's application for a rezoning of the State Property is granted, all 6.28 acres will be zoned CR.

2. *Character of the immediate vicinity and the uses contained therein.*

The area in the immediate vicinity of the Property is zoned Industrial. Immediately across Airport Road from the Hotel Site sits what appears to be a junkyard. The Mitigation Site raps around the junkyard. To the north of the Hotel Site is Interstate 95. To the south of the Property is a large area of wetlands owned by the State of Delaware. Along Airport Road to Commons Boulevard is a mix of residential and industrial uses.

3. *Whether, if the restriction upon applicant's property were removed, such removal would seriously affect such neighboring property and uses.*

The entire Property is located within the floodplain. Certainly building in a floodplain offends the

character of the floodplain, the immediate vicinity, and the nature of the zone where the property lies. If additional floodwater is displaced during a storm event due to the expansion, that water could be directed to surrounding areas that normally would not be affected during storm events. However, approval to build a hotel at this site was received in 1989 and a record plan was approved in 1990. The owners have a legal right to disturb the area and build an 118,805 sq. ft. hotel. The difference between an 118,805 sq. ft. hotel and 165,107 sq. ft. hotel is significant. Applicant has, however, proposed ways to minimize negative effects that the hotel and parking may create. First, Applicant has addressed the potential parking problem by acquiring land and providing 338 surface parking spaces. These are in addition to the fifty-two (52) spots located beneath the structure. Parkside has indicated that the fifty-two (52) garage spots will be used for employee parking or valet parking thus reducing the risk to guests of having to navigate among the large pilings and reducing the risk of property damage that may occur if the below-surface parking becomes inundated with flood waters. The proposed surface parking would be provided on-site thus reducing the possibility that cars will park on Airport Road or on the exit ramp for Interstate 95 and create traffic hazards. Second, Applicant has proposed a way to reduce increased flooding concerns on neighboring properties. Applicant secured title to the 16-acre parcel located across Airport Road and has submitted a plan to use that parcel for floodwater storage capacity mitigation. The plan involves the removal of fill from the Mitigation Site thus increasing floodwater storage capacity of the Property. Additionally, in total, the flooding concerns of the immediate area

should be somewhat alleviated by the removal of 14,278 cubic yards of fill. Parkside's Plan and variance application also provides for landscaping and bufferyards to shield the Property from surrounding uses. Overall, it appears that Applicant's proposal will be more beneficial to neighboring property and uses than what currently exists at the Property and perhaps what was approved in 1990.

4. *Whether if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the properly which is a permitted use under the provisions of the ordinance.*

When WH pursued its variance application in 2000, one of the primary reasons the Department opposed it was that WH created the need for the variances by disregarding the 1990 record plan and applicable Code requirements. The Department relied on *Weaver to* argue that there was no practical difficulty inherent in the land, or situation peculiar to the land, that created the variance requests. Weaver *New Castle County Board of Adjustment,* Del. Super, C.A. No. 90A-07-10, Toliver, J. (Oct. 23, 1991). The Delaware courts arc clear that an applicant cannot sock relief from its own self-created hardship. *See Leager v. Board of Adjustment of* New *Castle County,* Del. Supr, 504 A.2d 572, 573 (1986); Weaver, Del. Super., C.A. No. 90A-07-10, Toliver, 1. (Oct. 28, 1991). As stated by the Delaware Supreme Court, "self-imposed hardship defeats any right to a variance." *Baker v. Connell,* 488 A.2d 1303, 1309 (Del. 1985). To have granted the requested variances to WH would have encouraged "builders to build

without regard for applicable zoning regulations, if they knew construction in violation thereof would be sufficient justification for the issuance of the variance." *Weaver,* Del. Super., CA. No. 90A-07-10, Toliver, J. (Oct. 28, 1991). The clear message sent to the Board by the courts is that "[t]he time for seeking a variance approval comes before such improvements are commenced and not . . . after they have been completed." *Vassallo v. Penn Rose Civic Association,* 429 A.2d 168, 172 (Del. 1981).

Parkside contends that *Weaver* and its progeny are not applicable; that Parkside does not stand in the shoes of WH but is a new applicant with clean hands. Parkside contends that *Dexter* should control this application. *Dexter v. New Castle County Board of Adjustment,* 1996 WL 658861, Tolliver, I. (Del. Super. 1996). In *Dexter,* a family had purchased a property in 1994 that included a garage structure that contained a renovated apartment on the second floor. The garage structure encroached into the required rear yard setback. Although the structure existed since 1938 and was renovated in 1987, the Dexter's pursued an area variance to allow the existing encroachment. The Court found that Dexter's desire to use the property as it existed when they purchased the property is a problem that is intrinsically related to the property itself and not a problem resulting from self-created hardship. 1996 WL 658861 at 5. The court further found that "cases involving self-created hardships have typically involved some kind of affirmative action on the part of the landowner." *Id., quoting Vassallo,* 429 A.2d at 171.

The Applicant assures the Board that this is not a backdoor attempt to secure the variances and return the property to the Principals of WH. To establish its

independence from WH, Parkside offers the following restriction on the future transfer of the Property:

> Joesph Capano, Sr. ("Capano"), Albert Vietri ("Vietri"), and their spouses, natural and adopted children, natural and adopted offspring of their children, siblings, nephews, nieces and any "affiliate" (as defined below) of any such individuals, shall be prohibited for a period of 20 years from the date of this Board's decision from possessing any ownership or control in the hotel situate on the parcel of land described on Schedule A, attached hereto, or said hotel's management. "Affiliate" means (i) any corporation, partnership, unincorporated association, or other business entity of which any of the individuals listed above is a director, officer, or partner, or is, directly or indirectly, the owner of 5% or more of any class of voting stock or membership interest, or (ii) any trust or other estate in which any of the individuals listed above has at least 5% beneficial interest or as to which any of the individuals listed above serves as trustee or in a similar fiduciary capacity. It is the purpose and intent of this provision to assure that Messrs. Capano and Vietri shall not through their immediate families or by any other direct or indirect means have any participation in the operation, management or ownership of the hotel and that they shall obtain no financial or other economic benefit from the revenues of the hotel. The Board's relief shall be further conditioned on the recordation of a deed restriction to which New Castle County is a party containing substantially the same restrictions outline herein.

Based on Parkside's representations, the Department agrees that *Dexter* controls this application and granting the variances would not implicate the policy concerns of *Weaver*. Due to the developer's bad faith and self-created hardship, the hotel has remained in an unfinished state and unoccupied for over three (3) years. Because WH built without regard for applicable zoning regulations, it has lost ownership of the Property and remains tangled in legal proceedings. Under the present scenario, it is not the developer that seeks relief but an independent party that purchased the property from the bank. Republic provided over fifteen million dollars of financing to WH to construct the hotel and took title of the Property through legal actions only to secure repayment of the fluids invested in the project. Republic ostensibly did not participate in construction decisions and is thus removed from the bad faith concerns that cloak WH's principals. Parkside is further removed from any claims of bad faith since it had no involvement with the construction or financing of the hotel and can be considered a bona fide purchaser. Additionally, unlike WH, Parkside is not seeking relief from all UDC provisions in which it is in violation, but has proposed a Plan that is designed to resolve many of the Department's concerns and that will involve significant investment to implement In this case, the variances will not create an "easy-out" for a developer that created the problems, but will provide relief to a bona fide purchaser who purchased the property with certain investment backed expectations.

Conformance with the 1990 record plan would involve either demolishing the building and rebuilding it, or substantially modifying the building by removing at least 46,302 sq. ft. Rather, Parkside

proposes additional site improvements that will address existing code violations and seeks the least amount of variances necessary to allow the existing hotel to remain. Although it can be argued that the dimensional changes sought are not minimal, the "characterization of the deviation from the zoning requirements as 'minimal' or 'not minimal' is not a talisman for success one way or the other. It is simply one of the equities to be weighed when determining whether or not the standard is satisfied." *Doebling v. City of Lewes Bd. Of Adjustment,* Del. Super., C.A. No. 86A-FE1, 1987 WL 10274, Chandler, J. (April 20, 1987). The equities of this application weigh in favor of finding exceptional practical difficulty. Rather than seeking variances to legitimize the as-built condition of the Property, Parkside proposes to correct many problems caused by WH. For example, Parkside could have sought a parking variance but instead proposes to acquire land and add more than sufficient parking—this will involve substantial investment Parkside also attempts to satisfy landscaping requirements that cannot be met currently on-site by acquiring adjacent lands and providing landscaping, stormwater management, and riparian buffer enhancements on the new lands. Applicant also attempts to address floodwater storage capacity concerns by incorporating a flood mitigation proposal into this application. Arguably, Parkside would face exceptional practical difficulty rather than routine difficulty if it were required to modify the hotel to bring it into conformance with the 1990 record plan.

Recommendation

FOR THE FOREGOING REASONS, the Department recommends:

1. The Board GRANT the requested variance to allow an increase in the floor area ratio to allow the 165,107 sq. ft. structure to remain.
2. The Board GRANT the requested variance to reduce the required Landscape Surface Ratio to .41.
3. The Board GRANT the requested variance to reduce the number of loading berths from 3 to 1.
4. The Board GRANT the requested variance reducing the required paving setbacks of 25 feet from Airport Road in the areas identified on Applicant's Exhibit A to its Board of Adjustment application.
5. The Board GRANT the requested variance to reduce the required 0.4 opacity along streets and to 0.1 opacity along Airport Road and in the areas identified on Applicant's Exhibit A to its Board of Adjustment application.
6. The Board GRANT the requested variance to allow encroachments into the riparian buffer up to 84% where 100% protection and preservation of the riparian buffer zone is required.

The Department recommends that the Board subject all variances to the condition that Parkside acquires the State Property from the Department of Transportation. Furthermore, the variances should be conditioned upon County Council adopting a rezoning ordinance changing the zoning district designation of the 2.482 acres of the State Property from Industrial to Commercial Regional.

The Department further recommends that the Board subject all *variances* to the condition that Applicant demonstrates to the Board's satisfaction

that WH's principals are not, and will not be, the beneficiaries of the variances.

BENEFICIAL USE APPEAL

Parkside seeks a beneficial use determination to allow (1) a larger building footprint than was approved on the 1990 record plan; (2) the construction of a parking spaces on the State Property, and, (3) the disturbance of the floodplain at the Mitigation Site so that fill can be removed to create additional flood storage capacity. The footprint of the existing hotel exceeds that of the 1990 record plan by 8,116 sq. ft The Plan also contemplates construction of new parking areas in the floodplain. Approximately 12,000 cubic yards of fill were placed on the Hotel Site compared to the record plan and deed restrictions that required an increase in floodwater Storage capacity of 350 cubic yards. Thus, Applicant proposes to remove 14,278 cubic yards of fill from the Mitigation Site to provide additional floodwater storage capacity.

Applicant also requests that if the dimensional variances are not granted, a beneficial use determination could somehow grant Applicant carte blanche to violate the 1990 record plan and applicable Code provisions. The Department is convinced that this request for a beneficial use determination has no basis in law or equity and the Board has no jurisdiction to consider this request. Accordingly, the Department will address the beneficial use appeal for the building footprint, the new parking area, and the mitigation.

Floodplain Standards

Development in the floodplain for the existing building, proposed parking, and mitigation on the

adjacent site is subject to the standards in § 40.10.313, *Development in Floodplains*, § 10.314 *Filling in the Floodplain,* 10.315 *Standards for Beneficial Uses in Floodplains,* § 10.316 *Criteria for Building In and Near the Floodplain,* § 31.270 *Floodplain Permit,* and Division § 31.600, *Beneficial Use Appeal and Determination.*

The UDC is clear that there should be complete protection within the floodplain except for very limited circumstances. UDC § 10.310(B)(3) states no structures for human habitation are permitted in the floodplain except as a beneficial use under §§ 10.315 and 31.600 or if there is a nonconforming use that already exists subject to § 10.311. Furthermore, the only *uses* permitted in a floodplain arc delineated under § 10.313, which provides that a beneficial use is permitted after a beneficial use appeal.

If this Board chooses to grant a beneficial use determination, Applicant must meet the specific standards enumerated in § 10.315 for Beneficial *Uses in* the floodplain. Additionally, the Applicant is subject to § 10.314, *Filling in the Floodplain,* and § 10.316, *Criteria for Building in and Near the Floodplain,* as well as the standards listed in § 10.310(B)(6)(a)-(c). The Department's Engineering Section reviewed application to measure its compliance with these UDC Article 10 requirements. The engineering report is attached to this Recommendation. The report has identified areas of concern that must be addressed before any additional development can be pursued in the floodplain. Applicant has not placed any floodplain variance requests before this Board which indicates that the Applicant shall comply with all of the applicable UDC Article 10 provisions.

Legal Standards for Granting Beneficial Use Appeals

UDC Division 31.600 delineates the standards and requirements for a Beneficial Use Determination. According to § 31.630, if the Board finds that a landowner has been denied all or substantially all economically viable use of the property, the Board shall grant relief. Section 31.620 identifies the factors that that the Board shall take into account when determining whether a landowner has been deprived of the beneficial use of his property:

A. Diminution in Value. The property value, prior to the adoption of this Chapter, shall be compared to the property value with the regulations as applied A mere decrease in value does not deprive the landowner of all or substantially all beneficial use of property. The diminution in value must be such that it effectively deprives the landowner of all or substantially all viable use or enjoyment of the property.

B. Common Land Uses. A use common to the County and/or the area of the subject site, although it may not involve further development of the land, may be considered a beneficial use. Attention shall also be given to land uses considered to be the lowest intensity in the County or adjoining areas, but which uses still provide for occupation and living by the landowner.

C. Subsidy. A minimum beneficial use of the land may be a use where a governmental subsidy is provided. If such a subsidy exists, its value should be reflected in the considered minimum beneficial use on a valuation basis. The cumu-

lative public costs of a subsidy should be considered payment to the landowner for the restriction on the property if the annual subsidy enhances the economic return of the existing use to the landowner. The value of the proposed use shall be adjusted to reflect the degree to which a subsidy enhances the property value by determining the value of the use without the subsidy

D. Adverse Impacts. The extent to which this Chapter protects users, future users, or neighbors from threats to health, safety or general welfare shall be considered. A use that seriously threatens the health, safety or general welfare of current or future residents or neighbors shall not be considered a use the property owner is entitled to enjoy and shall not, when restricted by the County, constitute a denial of all or substantially all economic viable use of the property.

E. Expectations. Expectations shall, in general, not be considered. Only expectations backed by reasonable investments made prior to the adoption date of the regulations in question may be considered.

F. Nuisances. In no case shall a use that is a nuisance *per se,* or a use that in that particular location constitutes a nuisance, constitute grounds for relief.

G. The Board of Adjustment may also take into account any factors that have been considered by a federal court or a Delaware court in determining whether all, or substantially all, economic use of a property has been denied a

landowner who has made a takings claim pursuant to the federal or state Constitution.

H. If requested by the land owner, the Board of Adjustment shall make a determination as to whether the code provision at issue substantially advances a legitimate governmental interest. In making this determination, the Board of Adjustment may rely upon any relevant federal or state case law.

The Board shall grant only that level of relief necessary to provide for a beneficial use of the property. In granting relief, the landowner shall be given the minimum increase in use intensity or other possible concessions from this Chapter to permit a beneficial use of the land. The following guidelines are provided by § 31.630 to determine the minimum beneficial use of the property.

1. The standards set forth in Section 31.620 shall be used to help determine the need for additional density or uses.
2. The reality of limited development potential, given the natural condition of the property, shall not be attributed to the regulations applied to the property.
3. The potential for damages to either future residents or property shall be assessed in determining a beneficial use. Conditions shall be placed on sites where damage from hazardous conditions is likely. The conditions may include location restrictions, size limitations, and increased building standards.

Discussion

The UDC is predicated upon restricting building in the floodplain It is likely that a similar project for a

hotel built in a floodplain would not receive approval in today's floodplain regulatory climate. Nonetheless, County Council approved a floodplain application in 1989. The developer went through the subdivision review process with the Department in 1989 and 1990. An exploratory sketch, a preliminary plan, and a record plan were submitted to the County by the developer and approved in 1990. However, what exists today is something more than the 118,805 sq. ft hotel that was approved. Specifically, WH enlarged the footprint the hotel by 8,116 sq. ft. To accommodate parking for the additional uses and hotel space, Applicant proposes to construct additional parking within the floodplain. And, because WH added fill to the Property and reduced flood storage capacity, Parkside proposes to disturb the floodplain by removing 14,278 cubic yards of fill for the purpose of creating additional flood storage capacity beyond what existed in 1989.

Parkside has the burden of demonstrating it meets the deprivation standards delineated in § 40.31.620. Based on Applicant's submission dated January 14, 2004, it appears that Parkside can meet those standards. The Department revoked the building permit for the hotel when it was discovered that the building exceeded the square footage permitted by the 1990 record plan. The building has not 'received required inspections and significant building problems must be addressed and resolved before a certificate of occupancy can issue. It remains the Department position that before any work can be done in or about the structure, a new building permit must be secured. Additionally, before a building permit can be issued, a subdivision plan must be approved that reflects the gross floor area of the structure. The hotel has sat unoccupied for over three

(3) years and there has not been, and cannot be, any economically viable use of the property. Clearly, without plan approval, there can be no beneficial use of the Property.

An important component of the Parkside Plan is to provide additional floodwater storage capacity at the Mitigation Site. This use will benefit the neighboring property owners and the community. County Council conditioned the 1989 floodplain application upon certain deed restrictions that were intended to provide some level of safety from encroaching flood waters. in the application to amend the deed restrictions, Applicant should provide similar devices to protect from dangers that may exist from floodwaters.

Applicant has been denied substantially all economically viable use of the property through application of the UDC. There is no use for which the property can currently be used without further relief and further development There would be minimal adverse impacts if the beneficial use were granted. In fact, there will be a benefit to the general welfare if flood storage capacity is increased at the Hotel Site with the construction of the parking garage and at the Mitigation Site. Arguably, Parksidc has reasonable investment backed expectations. Finally, a hotel, its appurtenant uses, and adequate parking would not constitute a nuisance at that location.

Recommendation

FOR THE FOREGOING REASONS, the Department recommends that the Board GRANT the Beneficial Use Appeal requested by Applicant on the condition that the areas of concern delineated in the Engineering Report are addressed and resolved to the

satisfaction of the Department prior to any additional floodplain development.

NEW CASTLE COUNTY
DEPARTMENT OF LAND USE

BY: /s/ Charles L. Baker
CHARLES L. BAKER, General Manager
87 Reads Way
Corporate Commons
New Castle, DE 19720
(302) 395-5463

DATED:January 20, 2004

NOTE: This is a non-binding recommendation from the Department of Land Use to the Board of Adjustment.

[LOGO]

Department Of Land Use

NOTICE OF DECISION

REFERENCE: Application 04-0009-A

DATE DECISION FILED: March 26, 2004

APPLICANT: CONCORD PETS FOOD
& SUPPLIES, INC
(L/O RICHARD GROPPER).
3703 Concord Pike
Wilmington, DE 19803

PUBLIC HEARING DATE: February 26, 2004

DATE OF DECISION: February 26, 2004

REQUESTED: Applicant requests area variances from the required 15 foot street yard setback to maintain a building 6 feet from the Prospect Avenue right-of-way and 13.5 feet from the Concord Pike right of way; from the required 40 foot paving setback adjacent to the street to maintain paving I foot from the Concord Pike right of way and 0 feet from the Prospect Avenue right-of-way, from the required 10. foot paving setback to maintain paving at 0 feet adjacent to the easterly property line; from the required 0.3 opacity along the Concord Pike and Prospect Avenue right-of-way to maintain 0.0 opacity; from the required 45 percent landscape surface ratio to maintain 6.9 percent; from the maximum building square footage of 3,445 square feet to maintain 11,020 square-feet from the required minimum lot size of 20,000 square feet to maintain 19,136 square feet. 3703 Concord Pike, Wilmington. Tax Parcel No. 06-064.00-092. Zoning S. CD 2

The Board of Adjustment may grant a variance from the area or dimensional requirements of the County Code where it finds the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code applicable to the subject property.

The applicant requests six variances to maintain existing nonconforming conditions on the site. The application is a result of an attempt *to rectify errors in the* representation of square footage on the record plan. The existing plan shows a two story building on the property; however, the engineering firm listed the gross floor area of the building as 2,290 square feet, which actually only represents the first floor. After the building *was* constructed, a second floor was utilized for storage and small amount of office space. In addition to the building with the square footage discrepancy, a second building stands on the south western corner of the property. The building presently houses an Oriental rug store.

The Land Use Department proposed that the applicant submit a new plan, one that is subject to UDC standards, as the best option to fix the problem. As a result, several variances are necessary to preserve buildings in locations that were mostly code compliant when the buildings were built 10 years ago. The one feature that was not code compliant—the rear yard setback—was addressed through obtaining a variance on August: 16, 1990.

The first requested Mariance maintains the building at the south western corner 6 feet from Prospect Avenue and 13.5 feet from Concord Pike. No additions to the structures are proposed.

Next, the 40 foot paving setback adjacent to streets would be reduced to 1 foot along Concord Pike and 0 along Prospect. The 15 foot paving setback adjacent to the easterly property line would also be reduced to zero. The paving was laid out in compliance with the former code, and cannot be easily reworked given the existing building locations. The required opacity buffer adjacent to the easterly property line would necessarily be reduced to zero as well.

The site is more densely developed that the current code would allow. The property is well under the required 45% green space that the present code requires. Counting the second floor of the Concord Pet Food store, the property houses 11,020 square feet of gross floor area where the UDC would allow 3,445 square feet.

These variances are due to features that are common for older properties along Concord Pike which were developed under former codes. The sites are smaller, more compact, and often border two or more streets.

The Board votes to grant the requested variances, with the condition that the second floor of 3703 Concord Pike is limited to storage and off space only. The requested dimensional changes are minimal, in light of existing neighborhood conditions, and the harm to the applicant if the variances were denied would be greater than the probable effect on neighboring properties if the variances were granted. The granting of these variances will not cause substantial detriment to the public good, nor will they substantially impair the intent and purpose of the zoning code.

VOTE: 5-0 (Grant: Koyste, Reda, Ciabattoni, Kellam, Hardman)

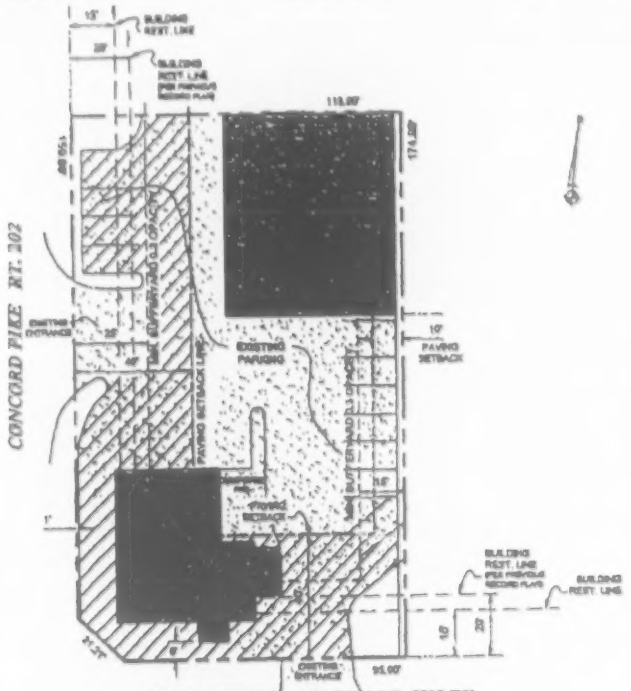
BOARD OF ADJUSTMENT
OF NEW CASTLE COUNTY

/s/ Christopher S. Koyste
Christopher S. Koyste
Chairman

NOTE: This special use permit is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the Division of Development and Licensing prior to construction or establishment of the use. This decision should be kept in a safe glace with the property deed. This decision may be appealed to the Superior Court by any person aggrieved by it within 30 days of its filing in the office of the Board of Adjustment.

NOTE: A special use permit becomes void if the variance is not put into effect within a two (2) year time period from the expiration of the appeal period following the date of filing this decision.

UBLIC HEARING DATE: February 26, 2004 ZONING: S APP. NO. 04-0009-A
OUNCILMANIC DISTRICT: 2 HUNDRED: Brandywine TAX PARCEL: 06-064.00-092



BOARD OF ADJUSTMENT
NEW CASTLE COUNTY, DELAWARE

Applicant: Concord Pet Food & Supplies, Inc (L/O Richard Gropper)
Address of Subject Property: 3703 Concord Pike
Wilmington, DE

Applicant seeks: VARIANCE: Various
OTHER:

DECISION: Grant with amendments to the legal notice to reflect the area variance from the required 15 foot street yard setback to maintain a building 6 feet from the Prospect Avenue right-of-way maintain 13.5 feet from the Concord Pike right-of-way and from the required 40 foot paving setback adjacent to the street to maintain paving 1 foot from the Concord Pike right-of-way.

DATE OF DECISION: February 26, 2004 SCALE: 1"=35' NCC 01699

1518

[LOGO]

Department Of Land Use

NOTICE OF DECISION

REFERENCE: Application 03-0509-A

DATE DECISION FILED: March 26, 2004

APPLICANT: Parkside V, LLC
15215 Shady Grove Road
Suite 102
Rockville, MD 20850

PUBLIC HEARING DATE: Jan. 20, 2004

DATE OF DECISION: Jan. 20, 2004

REQUESTED: The applicant requests an area variance from the following requirements of the Unified Development Code:

1) from the minimum 1.00 landscape surface ratio to provide 0.41;

2) from the maximum gross (0.50) and net (0.00) floor area ratios to provide a gross floor area ratio of 0.61, allowing a 165,107 square foot structure on a 6.28 acre property-,

3) from the required 3 loading berths to provide 1;

4) from the required 25 foot paving setback to provide 0 adjacent to the Airport Road right of way;

5) from the required 0.4 opacity adjacent to streets to provide 0.1 along Airport Road with an opacity of 0.0 at the southeasterly corner of the property;

6) from the 100% protection level afforded a Riparian Buffer Area to allow an 84% intrusion into the Riparian Buffet Area;

401 Airport Road (alternatively identified as 365 Airport Road) & 410 Airport Road. Tax Parcel *Nos.* 10-013.00-001, 003 and 005. CR and I Zoning. CD 1.

The Board of Adjustment may grant a variance from the area or dimensional requirements of the County Code where it finds the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code applicable to the subject property.

Parkside V, LLC ("the applicant" or "Parkside') seeks five area variances as well as a beneficial use appeal to move forward in the land development review process with a property that has been sitting in limbo for over three years. A 6-story, 165,107 square foot hotel stands on tax parcel 10-013.00-001, unopened since its construction. Discrepancies exist between the record plan under which the property was developed and the improvements that were actually built in July of 2000, the developer was unable to obtain approval from the Board of Adjustment for nine variances that would have allowed a new, accurate record plan to be recorded. The new owner of the property, Parkside, brings the instant application, which differs significantly from the application submitted in 2000.

The background behind construction of the hotel is set forth in detail in the Board's previous decision (Application #00-0552-A). Briefly, the original plan for the hotel was approved and recorded in 1990. This plan called for a 118,805 square foot hotel, with no reference to accessory uses. A building permit application for a 155,480 square foot structure was

approved by the Department of Land Use in 1999.[3] In June of 2000, the Department issued a stop work order and revoked the building permit, following the Department's discovery that the structure exceeded the size permitted by both the record plan and building permit. To reconcile the discrepancies between the record plan and the site, the developer, Wilmington Hospitality, LLC, submitted an application for nine variances to the Board. The record of the hearing included evidence that the developer missed several opportunities to discover the inconsistencies between the record plan and the building before construction began. Evidence was also submitted that indicated that the developer was aware of the discrepancies and made efforts to conceal them from third parties. The Board found that the developer had knowledge, or was charged with knowledge, of the restrictions on the record plan. The Board denied the application, *finding* that the need for the variances arose out of a self-created hardship, and that the proposed plan failed to meet the requirements for a variance as found in *Bd. of Adjustment v. Kwik-Check Realty, Inc.* 389 A.2d 1289 (Del. 1978) and §40.31.451 of the UDC. The developer's insufficient plan for dealing with the parking shortfall, as well as its lack of effort to comply with the Code's landscaping requirements drew particular attention from the Board.

The lender, Republic Bank took title to the vacant hotel in 2002. While preparing its own application to this Board, Republic Bank accepted Parkside's offer to buy the property. Parkside requested a conti-

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[3] An as-built survey performed by Parkside's engineer determined that the hotel has a gross floor area of 165,107 square feet.

nuance of the May 2003 Board hearing, submitting a revised exploratory sketch minor land development plan in December 2003 ("the Parkside Plan").

The Parkside Plan diverges from the previous plan in a number of ways. The Plan depicts the additional square footage over the originally approved 118,805 square feet, as well as the increased footprint of the structure. The Plan also shows ancillary uses in the hotel, including meeting rooms and restaurant, lounge and banquet facilities. A new parking area is proposed, which would accommodate the required number of spaces for development Parkside also intends to use a neighboring property for floodwater storage capacity in an effort to mitigate the placement of approximately 12,000 cubic yards of fill on the subject property.

Since the Parkside Plan does not conform to the Unified Development Code or the recorded plan of 1990, variances are required. In addition, the beneficial use appeal is necessary to ratify the development within the floodplain Nevertheless, the applicant does not simply propose to ratify existing development, but aims to mitigate the impact of that development on the protected resources in the area, while reducing the number of variances relative to the request made to the Board in 2000, The application achieves these goals through the addition of adjacent acreage, the implementation of a floodplain mitigation plan, and construction of additional parking to accommodate the uses on the property.

The applicant first seeks a variance from the maximum gross and net floor area ratios, which are standards meant to limit the density of development on a particular parcel. The UDC defines the gross floor area ("GFA") ratio as the total floor area of the

building divided by the base site area. The maximum GFA ratio for a hotel in a CR zoning district is 0.5. The GFA ratio for the development on the 3.409 acre hotel parcel is 0.82. A portion of this excess is due to the extra square footage beyond the 118,805 square feet allowed under the 1990 record plan; however, even the hotel as originally planned (0.80 GFA ratio), while meeting alder Code requirements, would exceed the current Code's requirements.

The net floor area ("NFA") ratio, which equals the total floor area divided by the net buildable site area, amounts to zero on this site. The entire site is within a floodplain. The area attributable to a protected resource such as a floodplain is subtracted from the base site area to yield the buildable site area Since the entire site lies within a floodplain, there is no buildable area to work with, leaving a maximum NFA ratio of 0.0.

Notwithstanding the fact that the property lies within the floodplain, County Council approved the construction of a hotel on this site in 1990. Even the smallest addition to the approved structure would have called for substantial variances from the UDC. The degree of the requested floor area ratio variances is lessened by this reality.

The impact of the floor area ratio variances is further minimized by Park-side's inclusion of neighboring properties into the equation. The *Plan* calls for Parkside to expand the hotel parcel to include 2.482 acres- of Tax Parcel No. 10-013,00-003 (the State Parcel), a 26 acre, undeveloped parcel to the southwest Parkside will also acquire 0.387 acres of the expansive buffer between the northerly property lines and the off-ramp and intersection to the north. Since all of the neighboring properties are also within the

floodplain, the additional acreage cannot improve the NFA ratio. However, the GFA ratio is reduced to 0.61, which is far below the floor area ratio that would have resulted from a structure that complied with the 1990 record plan.

Other than increasing the buildable site area, the only way to decrease the floor area ratios is to reduce the size of the structure. The applicant's witnesses indicated that this may not be possible, let alone practical. Whether demolishing the top two floors of the hotel, or removing a portion of the sides of the building to conform to the footprint shown on the 1990 record plan, the structure was not built to withstand the stresses caused by a partial demolition. It would likely be more costly to modify the building to fit the original record plan than it would be to completely demolish the structure. Given the fact that the structure that was approved in 1990 would not comply with the UDC, little benefit to the public would be achieved by partial demolition. By acquiring a larger base site area and building sufficient parking to avoid a variance from the parking standards, the applicant demonstrates a practical alternative to removing the extra square footage.

The applicant also seeks a variance from the required landscape-surface ratio (LSR") of 1.00. Under UDC Table 40.04.110, the minimum required LSR for a hotel in the CR zone is 0.35. The extent to which the floodplain covers the property increases the amount of required 'green' area on the site to 100 percent. If not for the floodplain, no variance would be necessary, since the Parkside Plan provides 41% landscape area on the site. While no development can occur on this site without the need for a variance from the LSR standard, the applicant respects the

spirit of the code by providing landscape area in excess of 35%, even as the supply of parking is increased.

The third variance requested is from the required 25 foot pavement setback, to provide zero feet along a portion of Airport Road. Only a small portion of the pavement intrudes a full 25 feet into the setback. The setback is reduced to zero at the southeastern corner of the site. A turnaround area, plus portions of 4 parking spaces lie inside the paving setback at this corner. Further north along the easterly property line, 11 'head-in' parking spaces encroach several feet into the pavement setback. The pavement was originally built over the property line and into the right of way. By securing a portion of the right of way, Parkside is able to remove the encroachment, leaving only the setback issue.

Without the pavement variance, Parkside would likely lose 25 parking spaces along Airport Road. To make up for the lost parking, the applicant estimated that approximately 8,000 square feet of impervious area would have to be added to the site. Given the L-shaped layout of the property, the parking would likely be placed in a more remote location. Structured parking would not adequately address the issue, since there would be no room for the required interior landscaping if a parking garage was squeezed onto the site. Here, the shape and topography of the site create an exceptional practical difficulty in complying with code standards.

The applicant requests a variance from the required 0.4 opacity standard in the same areas where the pavement setback is breached. Variances from these two standards often go hand-in-hand, chic to the fact that an encroachment into the pavement

setback reduces the bufferyard width available to reach higher opacity values. Much of the area along Airport Road will be rated at an opacity of 0.1. The small area where pavement would reach the property line would necessarily maintain an opacity of 0. The justifications offered for the pavement variance apply equally to the opacity variance. Without a variance from opacity, a minimum 20 foot wide buffer would be required along Airport road, with 2.45 plant units and a 4 foot masonry wall located in the buffer. Ellen Mercurio, the applicant's landscape architect, observed that the degree of the variance was somewhat minimal, considering that a 39% proportional compliance figure may be applied to the bufferyard. Applying 39% compliance to an opacity of 0.4 yields less than half of a plant unit difference compared with the 0.1 opacity that will be provided.

The hotel was built with one loading berth, requiring a variance from the current code's requirement of three loading berths for a hotel of this size. There are no suitable locations for an additional loading berth, given the configuration of the property and the interior layout of the structure. Even if an additional location was available, parking spaces would be sacrificed. William Fasy, chief operating officer of Delaware Park and vice president of its affiliate, Parkside V, LLC, stated that the single berth would be sufficient for the hotel. Based on his experience with the day-to-day operations at Delaware Park, Mr. Fasy testified that the single berth, while inconvenient, would not pose an operational or safety problem for the hotel. Mr. Fasy also noted that space was available for a second delivery truck to wait while the dock is in use.

The applicant also seeks a variance from the protections afforded a riparian buffer area ("RBA"). An RBA is defined to include not only a buffer around an aquatic resource, but also the resource itself. In this case, the site is entirely within the floodplain. Under the UDC, any construction on the site would require a variance from this standard. Development on the site presents an 84% encroachment into the resource, a smaller variance in comparison to the plan submitted by Wilmington Hospitality, which would have involved close to 100% disturbance of the RBA.

Ms. Mercurio detailed the riparian enhancement plan that Parkside would initiate on the property. Parkside will remove existing exotic and invasive plants from the RBA, replant restorative native plants, and reforest the area to at least the minimum required by a mitigation plan that is compliant with UDC standards. The disturbance of the ground surface in wetland areas would not be limited. These steps would be identified as a note on the record plan, so that their completion would be required to achieve record plan compliance.

In an effort to mitigate the impact of the development on the floodplain, the applicant purchased 410 Airport Road, a 16-acre parcel located across Air port Road from the hotel (the "16-Acre Parcel"). The 16-Acre Parcel is an Industrial zoned property with grandfather development approvals that would allow the addition of 1,624 cubic yards of fill Rather than develop the property, Parkside would remove fill that was deposited on the property in the past and restrict its further development Between the hotel parcel and the 16-Acre Parcel, Parkside not only offsets the fill that was deposited in building the hotel, it will increase floodplain storage volume by over 4,000

cubic yards of fill beyond the level maintained by the property before development took place. While the purchase of the 16-Acre. Parcel property makes no impact on the degree of the variances as stated in the request, consideration of Parkside's plans for the property along with the efforts Parkside will enact on the hotel parcel is appropriate when evaluating whether the variances are justified.

The applicant also requests a beneficial use appeal to further build in the floodplain, as well as ratify the construction in excess of that allowed by the 1990 record plan. The floodplain provisions of the UDC are based on minimizing building or filling in the floodplain. UDC §40.10.313 provides six exceptions that would allow such activity in the floodplain. Only one exception applies in this circumstance: if the Board of Adjustment allows the activity to support a beneficial use of the property.

The Board of Adjustment may consider an application for a beneficial use appeal where, pursuant to §40.31.630 of the UDC, an applicant alleges that the adoption of the UDC has denied all or substantially all economically viable use of the property. In ruling on such an application, the Board, pursuant to UDC §40.31.620, shall consider the actual diminution in value, common land uses in the area, any government subsidies available to the applicant, adverse impacts on the surrounding community, any reasonable investment backed expectations possessed by the applicant at the time he purchased the property, and whether the use proposed by the applicant would constitute a nuisance.

The applicant draws comparisons between the UDC's beneficial use criteria and the U.S. Supreme Court's takings analysis in *Penn Central Trans-*

portation v. New York, 438 U.S. 104 (1987), in which the Supreme Court denied a takings claim where the city of New York refused to allow the construction of an office tower over Grand Central Terminal. While the property *in Penn Central* was capable of earning a reasonable return, here, the applicant observes, the property presently yields no return or even the possibility of a return. An appraisal of the property performed by Greystone Realty Advisors in 2001 states that the hotel cannot be used without relief from the Code. Even it originally permitted 118,805 square feet could not be used without such relief. Given its location in the floodplain, the property loses economic viability for any use without the Board granting a beneficial use appeal.

The applicant asserts that the Parkside Plan will not have an adverse impact on other uses in the area Ironically, this beneficial use appeal will result in the removal of fill, rather than the addition of fill, resulting in an increase in flood storage capacity. The Board favorably views this type of mitigation. The Floodplain Fill Evaluation Report prepared by Duffield Associates confirms that the property is located in the floodplain, not the floodway, and that the development will cause no net increase in flooding in the vicinity. The Floodplain Report asserts that the floodplain mitigation may even reduce flooding in "lower frequency storm events?' The applicant does not seek a floodplain variance, and will adhere to the requirements for developing in floodplains found in Division 40.10.300.

As for the impact of flooding events on the hotel itself, the nature of the floodplain in this area is such that the velocity of the water will not be a concern, only the elevation of the water. Jeffrey Bross of

Duffield Associates stated that inundation, rather than stress to the structural load, was the real issue posed by flood conditions. Pursuant to the Code, the habitable areas of the hotel are elevated above flood levels, limiting the potential for damage. Mr. Bross also noted that snow load and high wind conditions were more likely to present structural stress on the hotel than a flood ever would.

Parkside represents that its Plan represents the lowest intensity land use for the parcel. The expansion of the property's boundaries and the commitment to leaving the 16-Acre property undeveloped are additional factors that minimize the intensity of the development in this area.

The Department of Land Use provided a detailed recommendation in favor of the proposed relief The recommendation was conditioned on Parkside acquiring the adjoining land from the state., as well as on County Council rezoning all land acquired from DelDOT from Industrial to Commercial Regional The Department further recommended that the applicant satisfy the Board that the original developer not benefit from the granting of the requested relief. The Board declines to adopt this condition, given the development of case law that prohibits conditions that impact the alienation of property tights. The Department also requested that the beneficial use appeal be subject to the applicant resolving engineering issues identified in the Department Engineering Report

One member of the public spoke in opposition to the development. The speaker believed that denying the variances would send a message to developers that the Code need not be followed Alternative proposals were suggested, including filling two stories

with foam or allowing nonprofit organizations to operate in the excess space. These alternatives, however, would not be allowed without additional relief from the Code. The speaker was not concerned with the possibility that the hotel remain completely unused.

The Board votes to grant the requested variances. The granting of this variance will not cause substantial detriment to the public good, nor will it substantially impair the intent and purpose of the zoning code. The applicant's plan is a substantial improvement to the submission made by the original developer, putting the vacant hotel to use while mitigating the impact made by a development that was more intense than originally approved There is no finding of bad faith to impact the Board's decision, as it did the previous decision, The applicant likely brings the best plan possible to make use of the hotel, while accommodating the stricter requirements of a newer code. Parkside takes the step that many Board applicants fail to investigate: acquiring adjoining property to avoid variances or reduce their magnitude. Parkside's employment of this option has a favorable impact on the floor area ratio and landscape surface area variances, by increasing the base site area; on the opacity and pavement setbacks, by increasing the bufferyard widths in front of the hotel; and on parking and interior landscaping standards, by allowing sufficient space to completely satisfy the requirements.

The harm to the applicant if the variance is denied would be greater than the probable effect on neighboring properties if the variance is granted. The Parkside Plan meets the UDC's stringent parking requirements. The effort to accommodate the re-

quired parking is a significant improvement over the plan which the Board originally denied. The public's safety and the impact on neighboring properties would have been substantial if vehicles were routinely parked along the bordering roads. Parkside's floodplain mitigation plan may have a favorable impact on neighboring properties by removing fill from the floodplain. Parkside will also improve the quality of the wetlands in the area. Without relief from the UDC, the hotel will remain vacant.

The variances are conditioned on the applicant acquiring property from DelDOT consistent with the applicant's testimony at the hearing. The variances are also conditioned on the adjacent DelDOT property that is to be merged into the hotel parcel being rezoning to Commercial Regional (CR) zoning.

The Board also votes to grant the beneficial use appeal. The floodplain provisions of the Code deny the applicant substantially all economically viable use of the property. This application is somewhat unique, as County Council had already approved an application to develop in the floodplain in 1989. Following that application, the developer filed a record plan that was recorded in 1990. The beneficial use appeal is necessary to ratify the extent to which the existing structure exceeds what was permitted under the 1990 record plan, as well as for the additional parking that is necessary to accommodate the hotel, and for the mitigation that will occur on the 16-Acre Property. These are the minimum steps necessary to put the property to a reasonable, economically viable use. The option of starting over with this land is unavailable, as Article 8 of the UDC would require any redevelopment of the property to comply with UDC standards. Finally, rather than

adversely impacting neighbors and the environment, the proposal will have the effect of mitigating harm that was done when the property was originally developed. The approval is conditioned on the applicant addressing the concerns raised in the Department's Engineering Report to the Department's satisfaction prior to construction.

VOTE:

Variance #1: Approved 4-2 (Grant: Clark, Koyste, Reda, Ciabattoni; Deny: Hardman, Rolleri)

Variance #2: Approved 6-0 (Grant: Clark, Koyste, Reds, Ciabattoni, Hardman, Rolleri)

Variance #3: Approved 6-0 (Grant: Clark, Reda, Koyste, Ciabattoni, Hardman, Rolleri)

Variance #4: Approved 6-0 (Grant: Clark, Koyste, Reda, Ciabattoni, Hardman, Rolleri)

Variance #5: Approved 6-0 (Grant: Clark, Koyste, Reda, Ciabattoni, Hardman, Rolleri)

Variance #6: Approved 5-1 (Grant: Clark, Koyste, Reda, Ciabattoni, Hardman; Deny: Rolleri)

All variances are subject to the conditions stated above.

Beneficial Use Appeal:

Approved 4-2 (Grant: Clark, Koyste, Reda, Ciabattoni; Deny: Hardman, Rolleri)

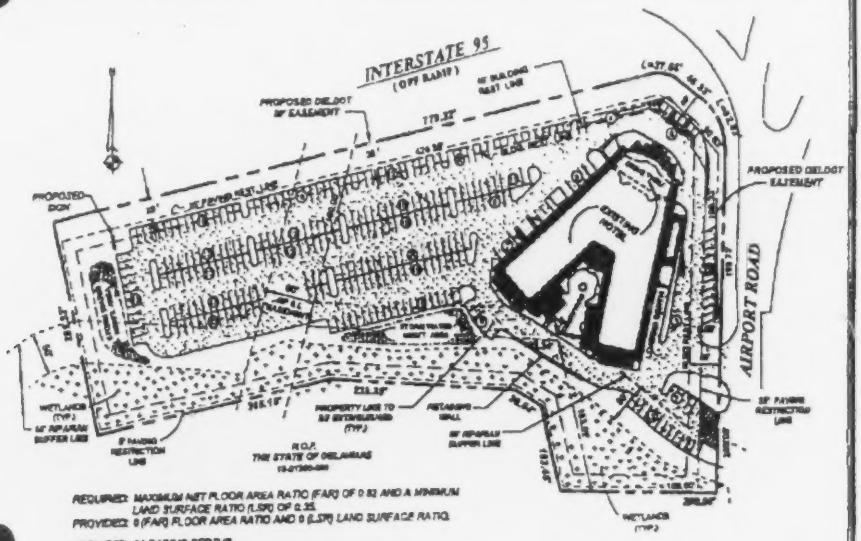
BOARD OF ADJUSTMENT
OF NEW CASTLE COUNTY

/s/ Chris S. Koyste
Chris S. Koyste
Chairman

NOTE: This relief is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the Division of Development and Licensing prior to construction or establishment of the use. This decision should be kept in a safe place with the property deed. This decision may be appealed to the Superior Court by any person aggrieved by it within 30 days of its filing in the office of the Board of Adjustment.

NOTE: A variance becomes void if the variance is not put into effect within a two (2) year time period from the expiration of the appeal period following the date of filing this decision.

PUBLIC HEARING DATE: January 20, 2004 ZONING: CR APP. NO. 03-0509-A
COUNCILMANIC DISTRICT: 1 HUNDRED: New Castle TAX PARCEL: 10-013.00-001 & 10-013.00-005



REQUIRED: MAXIMUM NET FLOOR AREA RATIO (FAR) OF 0.92 AND A MINIMUM LAND SURFACE RATIO (LSR) OF 0.25.
PROVIDED: 0 (FAR) FLOOR AREA RATIO AND 0 (LSR) LAND SURFACE RATIO.

REQUIRED: 3 LOADING BERTHS.
PROVIDED: 1 LOADING BERTH.

REQUIRED: 25 FOOT PAVING SETBACK ADJACENT TO AIRPORT ROAD R.O.W.
PROVIDED: 0 FEET.

REQUIRED: 0.4 OPACITY ALONG AIRPORT ROAD R.O.W.
PROVIDED: 0.1 OPACITY.

REQUIRED: 0.3 OPACITY ADJACENT TO THE SOUTHEASTERLY AND SOUTHWESTERLY PROPERTY LINES.
PROVIDED: 0 OPACITY.

REQUIRED: 100 PERCENT PROTECTION OF THE RIPARIAN BUFFER AREA (RBA).
PROVIDED: 94 PERCENT PROTECTION.

BOARD OF ADJUSTMENT
NEW CASTLE COUNTY, DELAWARE

Applicant: Parkside V., L.L.C.
Address of Subject Property: 365 & 408 Airport Road
New Castle, DE

Applicant seeks: VARIANCE: Various
OTHER: Beneficial Use Appeal

ECISION: Grant all variances with the conditions stated on the decision.
Grant the Beneficial Use Appeal.

DATE OF DECISION: January 30, 2004 SCALE: 1"=140'

NCC 01831

IN THE SUPERIOR COURT OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No.
Non-Arbitration Case

WILMINGTON HOSPITALITY, LLC,
a Delaware limited liability company,
Plaintiff,

v.

NEW CASTLE COUNTY,
a political subdivision of the
State of Delaware,
Defendant.

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Wilmington Hospitality, LLC complains of Defendant New Castle County as follows:

Parties

1. Plaintiff Wilmington Hospitality, LLC ("WH") is a limited liability company duly organized and existing under the laws of the State of Delaware with its principal place of business located at 1601 Concord Pike, Wilmington, Delaware. The principals of WH are Joseph L. Capano ("Capano") and Albert Vietri ("Vietri").

2. Defendant New Castle County ("County") is a governmental entity organized and existing under the laws of the State of Delaware with an office for the conduct of governmental affairs located at 87 Reeds Way, New Castle, Delaware.

Background Facts

3. WH was, at all times material hereto, the owner of the Plaza Suites Hotel which is also known as the Radisson (hereinafter the "Radisson").

4. The Radisson is situated upon approximately three acres of land alongside Airport Road and 1-95 (the "site").

5. In 1989, the County rezoned the site from M-2 (general industrial) to C-2 (roadside business) to specifically allow for a full-service hotel.

6. On January 5, 1990, WH's predecessor Hodev, Inc. ("Hodev") submitted a Preliminary Plan to the New Castle County Department of Planning for the construction of a six-story, 118,805 square foot 195 room hotel to be located at the site.

7. The area directly surrounding the site is dominated by an interstate highway and is overwhelmingly industrial, consisting of some scattered junk yards, a recycling center and auto repair shops. There was no residential development in the area in 1990, nor is there any such development in the vicinity today.

8. Hodev's Preliminary Plan was approved by the County on February 6, 1990.

9. On March 20, 1990, Hodev submitted a final plan ("Record Plan") with the County which was consistent with the Preliminary Plan.

10. On April 11, 1990 the County approved the Record Plan and same was recorded on April 25, 1990.

11. Hodev retained an architect, Joseph Chickadel of the architectural firm Design Collaborative, Inc., who Hodev intended would design and ultimately oversee the building of the hotel.

12. Mr. Chickadel and Mr. Capano traveled to Arizona to visit a hotel with a design that appeared to be compatible with the site. Mr. Chickadel then obtained the plans for that hotel.

13. Using the plans from the Arizona hotel as a model, Mr. Chickadel and his firm began developing preliminary drawings for the site. However, instead of designing a six-story 195 room hotel of 118,805 square feet in accordance with the Record Plan, Mr. Chickadel and his firm, despite having received a copy of the Record Plan with the correct square footage, mistakenly prepared drawings for a six story 191 room hotel with a total square footage of approximately 156,000 square feet.

14. Because of a downturn in the hotel industry, the project to build the hotel was temporarily placed on hold and Mr. Chickadel and his firm never completed the plans.

15. In 1997, approximately seven years after the Record Plan was approved by the County, the hotel industry improved and Hodev contacted Mr. Chickadel to complete the architectural drawings. Because Mr. Chickadel and Hodev were not able to reach an agreement on the price for completing the plans, Hodev hired the firm of Architectural Alliance, Inc. to do so.

16. Believing that the hotel design reflected in the drawings prepared by Mr. Chickadel and his firm

complied with all applicable approvals and zoning requirements, Architectural Alliance, Inc. did not check the Record Plan, which had been sent to the firm, but instead completed architectural drawings for the Radisson based on the design reflected in the preliminary drawings prepared by Mr. Chickadel and his firm.

17. Unlike office or retail space where square footage is the relevant economic measure, hotel economics are determined by the number of rooms and the other services offered. Consequently, the principals of Hodev were focused on the number of rooms and services offered, not square footage, and did not know that the final design exceeded the square footage limitations set forth in the Record Plan seven years earlier.

18. On June 5, 1998, Architectural Alliance, Inc., on behalf of Hodev, filed an application for a building permit with the County. Along with the application, Architectural Alliance, Inc. submitted architectural drawings showing the six-story, full-service hotel with the architect's estimate of gross floor area of 155,480 square feet.

19. On July 21, 1998, approximately 47 days after the submission of Hodev's application for a building permit and after a complete review of the architectural drawings, the County issued Building Permit No. 1953 ("Building Permit") for the construction of a six floor, 155,480 square foot, full-service hotel.

20. Prior to construction, Hodev conveyed its interest to WH, the principals of which are the same as of Hodev.

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25. County officials immediately took the false and unfounded position that WH intentionally overbuilt and engaged in criminal conduct, and refused to issue a certificate of occupancy. As will be discussed more fully below, County officials made it clear in public statements and by their actions that the Radisson would not be permitted to open unless WH and its principals forfeited their interests in the hotel to a third party.

26. On June 22, 2000, despite construction of the Radisson being substantially completed, the County purported to revoke WH's permit to build the hotel.

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33. On July 27, 2000, the Board voted to deny the variance request, notwithstanding the fact that WH was entitled to the variances it sought.

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48. On November 2, 2001, the County issued a letter purporting to revoke the February 2, 2001 letter of the County Attorney. This was done two days prior to a scheduled hearing with WH's lender in Bankruptcy Court, and, upon information and belief, was done with the intent to undermine and interfere with WH's bankruptcy.

49. On November 2, 2001, WH entered into an agreement to sell the hotel to Reese Hotels, LLC, ("Reese") a Pennsylvania limited liability company whose principals were not related to or affiliated with WH or its principals. The Agreement of Sale was subsequently approved by the Bankruptcy Court.

50. Under the terms of the Agreement of Sale, WH was required to obtain a certificate of occupancy in order for the transaction to close.

51. On November 27, 2001, WH entered into a Stipulation and Settlement Agreement with the Bank

in connection with the Chapter 11 proceeding. The Stipulation and Settlement Agreement was subsequently approved by the Bankruptcy Court.

52. Under the terms of the Settlement Agreement with the Bank, WH could have satisfied its obligation to the Bank by: a) paying the Bank $13,650,00.00 on or before December 31, 2001 or b) paying the Bank $13,850,000.00 on or before March 31, 2002.

53. In a malicious effort to prevent WH from closing on the Reese transaction and thereby recouping some of the financial losses it had sustained, the County arbitrarily refused to issue a certificate of occupancy and refused to cooperate in any manner whatsoever with Reese. Accordingly, WH could not close on the Reese transaction and could not meet its obligation to the Bank.

54. In or about April, 2002, the Bank took title to the hotel.

Count I

42 U.S.C. § 1983

Substantive Due Process

55. WH hereby incorporates by reference paragraphs 1 through 54 above as though fully set forth herein.

56. WH submits that the County's actions were taken in bad faith and for the malicious purpose of depriving WH and its principals of the ownership of the Radisson property and any financial benefit to be derived therefrom. In acting as aforesaid, the County and its officials have engaged in arbitrary and irrational conduct and an egregious abuse of power which shocks the conscience.

57. The County and its officials have acted under color of state law with the intent to unlawfully deprive WH of its property without substantive due process in violation of the Fourteenth Amendment to the United States Constitution.

58. The acts of the County and its officials constitute official policy, custom and practices of the County.

59. As a direct and proximate result of the County's conduct, WH has sustained substantial monetary damages including out of pocket expenditures made in connection with the hotel totaling approximately $8,000,000.00, lost profits which are presently unascertained but believed to exceed $20,000,000.00, the value of the hotel which is presently unascertained but believed to exceed $20,000,000.00, engineering fees, attorneys' fees, court costs and other damages to be established at the trial of this matter.

WHEREFORE, Plaintiff Wilmington Hospitality, LLC demands judgment in its favor and against Defendant New Castle County for: (1) compensatory damages; (2) pre and post-judgment interest; (3) attorneys' fees and court costs; (4) declaratory relief declaring the actions of the County to be violative of the Plaintiffs constitutional rights; and (5) such other and further relief as this Court deems appropriate.

Count II

42 U.S.C. §1983

Equal Protection

60. Plaintiff WH hereby incorporates by reference paragraphs 1 through 59 above as though fully set forth herein at length.

61. The County and its officials have acted under color of state law with the intent to unlawfully deprive

WH of its property in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In this regard, the County and its officials have failed to treat WH in the same manner as similarly situated landowners and developers and the difference in treatment is arbitrary and irrational.

62. The acts of the County and its officials constitute official policy, custom and practices of the County.

63. As a direct and proximate result of the County's conduct, WH has sustained substantial monetary damages including out of pocket expenditures made in connection with the hotel totaling approximately $8,000,000.00, lost profits which are presently unascertained but believed to exceed $20,000,000.00, the value of the hotel which is presently unascertained but believed to exceed $20,000,000.00, engineering fees, attorneys' fees, court costs and other damages to be established at the trial of this matter.

WHEREFORE, Plaintiff Wilmington Hospitality, LLC demands judgment in its favor and against Defendant New Castle County for: (1) compensatory damages; (2) pre and post-judgment interest; (3) attorneys' fees and court costs; (4) declaratory relief declaring the actions of the County to be violative of the Plaintiffs constitutional rights; and (5) such other and further relief as this Court deems appropriate.

Count III

Inverse Condemnation

64. Plaintiff WH hereby incorporates by reference paragraphs 1 through 54 above as though fully set forth herein at length.

65. The County denied WH all economically viable use of the hotel property.

66. The County's actions did not substantially advance any legitimate public purpose.

67. In acting as aforesaid, the County effected a taking of WH's property without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I Section 8 of the Delaware Constitution.

68. The fair market value of the property taken by the County is presently unascertained, but is believed to exceed $20,000,000.00.

WHEREFORE, Plaintiff Wilmington Hospitality, LLC demands judgment in its favor and against Defendant New Castle County for: (1) just compensation damages; (2) pre and post-judgment interest; (3) attorneys' fees and court costs; (4) declaratory relief declaring the actions of the County to be violative of the Plaintiffs constitutional rights; and (5) such other and further relief as this Court deems appropriate.

Count IV

Breach of Contract

69. Plaintiff WH hereby incorporates by reference paragraphs 1 through 54 above as though set forth herein at length.

70. County officials and representatives of WH including WH's bankruptcy attorneys and attorneys for MSJ Realty Trust, a Bankruptcy Court approved prospective purchaser, attended a meeting at which the County agreed to issue a temporary certificate of occupancy if WH complied with the terms of a letter from the County Attorney dated February 2, 2001.

71. Pursuant to that agreement and in reliance thereon, WH, its attorneys and engineers proceeded to prepare the documents requested in the February 2, 2001 letter of the County Attorney and otherwise substantially performed their obligations.

72. The agreement to issue a temporary certificate of occupancy was an integral part of WH's bankruptcy reorganization efforts and this was expressed to the County as part of the negotiations to obtain the agreement.

73. The County materially breached the agreement with WH by issuing a letter dated November 2, 2001, purporting to revoke the February 2, 2001 letter of the County Attorney and by failing to issue the temporary certificate of occupancy.

74. WH submits that the breach was engaged in with the malicious intent of interfering with and undermining WH's reorganization efforts before the Bankruptcy Court.

75. As a direct and proximate result of the County's breach, WH has sustained substantial monetary damages including out of pocket expenditures made in connection with the hotel totaling approximately $8,000,000.00, lost profits which are presently unascertained but believed to exceed $20,000,000.00, the value of the hotel which is presently unascertained but believed to exceed $20,000,000.00, court costs and other damages to be established at the trial of this matter.

WHEREFORE, Plaintiff Wilmington Hospitality, LLC demands judgment in its favor and against Defendant New Castle County for: (1) compensatory damages; (2) pre and post-judgment interest; (3) court costs; and (4) such other and further relief as this Court deems appropriate.

/s/ Adam Balick, Esquire

Adam Balick, Esquire
Balick & Balick
711 King Street
Wilmington, DE 19801
Attorney for Plaintiff

Dated: July 28, 2003

IN THE SUPERIOR COURT OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 03C-07-213 (MMJ)
Non-Arbitration Case

WILMINGTON HOSPITALITY, LLC,
a Delaware limited liability company,
Plaintiff,

v.

NEW CASTLE COUNTY,
a political subdivision of the State of Delaware,
Defendant.

JURY TRIAL DEMANDED

PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiff Wilmington Hospitality, LLC ("WH") respectfully requests that the Court enter an Order granting Plaintiff leave to amend its Complaint. The grounds for the Motion to Amend are as follows:

1. Superior Court Civil Rule 15 directs liberal granting of amendments to pleadings. *Bailey v. Crowson,* 2004 WL 2419172 (Del.Super.) at *3 *citing Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993). "In the absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend." *Mullen, supra*, 625 A.2d at 263 *citing Ikeda v. Molock*, 603 A.2d 785 (Del. 1991).

2. In its original Complaint, WH alleged that the County denied WH "all economically viable use of the hotel property." Complaint ¶ 65. By Memorandum Opinion and Order dated August 4, 2004, the Court, *inter alia*, granted Defendant's Motion to Dismiss Count III of the Complaint. *Wilmington Hospitality, LLC v. New Castle County*, C.A. No. 03C-07-213 (MMJ), Johnston, J. (Del. Super. August 4, 2004). On August 20, 2004, Plaintiff filed a Motion for Reargument of the Court's decision. In a Memorandum Order dated October 4, 2004, the Court denied Plaintiff's Motion for Reargument after concluding that the Plaintiff s cause of action was based upon the theory of a categorical or complete regulatory taking which, the Court found, "only occurs when there has been a complete elimination of value or a total loss." *Wilmington Hospitality, LLC v. New Castle County*, 2004 WL 2419157, Del. Super., October 4, 2004 at 2.

3. Plaintiff seeks to amend its Complaint to assert alternative theories of recovery. More specifically, the Plaintiff seeks to assert that: (a) in the alternative, the County temporarily denied WH all economically viable or beneficial use of the hotel property and (b) in the alternative, to the extent the County's actions fell short of denying WH all economically viable or beneficial use of the hotel property, the County nonetheless effected a temporary or permanent taking of WH's property without just compensation based upon the economic effect of the County's actions on WH, the extent to which the County's actions interfered with WH's reasonable investment-backed expectations and the character of the County's actions. See blacklined Amended Complaint attached hereto marked Exhibit "A" requested additional language appearing in ¶¶ 65, 67 and 68 in

bold. A clean draft of the Amended Complaint is attached hereto marked Exhibit "B"[1].

Since liberal granting of amendments is directed by Superior Court Civil Rule 15 and there is no prejudice to the County as this case is in the pleading stage, Plaintiff respectfully requests that the Court grant its Motion to Amend.

/s/ Adam Balick
Adam Balick (ID# 2718)
Law Offices of Balick & Balick
711 North King Street
Wilmington, DE 19801
(302) 658-4265
Attorneys for Plaintiff
Wilmington Hospitality, LLC

Of Counsel:

John J. Yannacone
Yannacone & Baldo
The Office Court at Pennell Place
1215 W. Baltimore Pike, Suite 2
Media, PA 19063
(610) 565-9500

Dated: December 3, 2004

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[1] Plaintiff recognizes that the Court has previously granted Defendant's Motion to Dismiss with respect to Plaintiff's substantive due process and inverse condemnation claims set forth in the original Complaint, however, those claims remain in the Amended Complaint so as not to prejudice any post-trial or appellate rights Plaintiff may have in connection with those claims.

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Plaintiff,

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NEW CASTLE COUNTY,
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ORDER

AND NOW, this _____day of_____, 2004, upon consideration of the above named Plaintiff's Motion to Amend Complaint, the Motion is HEREBY GRANTED.

BY THE COURT:

_____
The Honorable Mary M. Johnston

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AMENDED COMPLAINT

Plaintiff Wilmington Hospitality, LLC complains of Defendant New' Castle County as follows:

Parties

1. Plaintiff Wilmington Hospitality, LLC ("WH") is a limited liability company duly organized and existing under the laws of the State of Delaware with its principal place of business located at 1601 Concord Pike, Wilmington, Delaware. The principals of WH are Joseph L. Capano ("Capano") and Albert Vietri ("Vietri").

2. Defendant New Castle County ("County") is a governmental entity organized and existing under the laws of the State of Delaware with an office for the conduct of governmental affairs located at 87 Reeds Way, New Castle, Delaware.

Background Facts

3. WH was, at all times material hereto, the owner of the Plaza Suites Hotel which is also known as the Radisson (hereinafter the "Radisson").

4. The Radisson is situated upon approximately three acres of land alongside Airport Road and 1-95 (the "site")

5. In 1989, the County rezoned the site from M-2 (general industrial) to C-2 (roadside business) specifically allow for a Full-service hotel

6. On Janua,y .5, 1990, WH's predecessor Hodev, Inc. ("Hodev") submitted a Preliminary Plan to the New Castle County Department of Planning for th[e] construction DI' a six-story, 118,805 square foot 195 room hotel to be located at the site.

7. The area directly surrounding the site is dominated by an interstate highway and is overwhelming industrial, consisting of some scattered junk yards, a recycling center and auto repair shops. There was no residential development in the area in 1990, nor is there any such development in the vicinity today,

8. Hodev's Preliminary Plan was approved by the County on February 6, 1990.

9. On March 20, 1990, Hodev submitted a final plan ("Record Plan") with the County which was consistent with the Preliminary Plan.

10. On April 11, 1990 the County approved the Record Plan and same was recorded on April 25, 1990.

11. Hodev retained an architect, Joseph Chickadel of the architectural firm Design Collaborative, Inc., who Hodev intended would design and ultimately oversee the building of the hotel.

12, Mr. Chickadel and Mr. Capano traveled to Arizona to visit a hotel with a design that appeared to be compatible with the site. Mr. Chickadel then obtained the plans for that hotel.

13. Using the plans from the Arizona hotel as a model, Mr. Chickadel and his firm began developing preliminary drawings for the site. However, instead of designing a six-story 195 room hotel o f 118,805 square feet in accordance with the Record Plan, Mr. Chickadel and his firm, despite having received a copy of the Record Plan with the correct square footage, mistakenly prepared drawings for a six story 191 room hotel with a total square footage of approximately 156,000 square feet,

14. Because of a downturn in the hotel industry, the project to build the hotel was temporarily placed on hold and Mr. Chickadel and his firm never completed the plans.

15. In 1997, approximately seven years after the Record Plan was approved by the County, the hotel industry improved and Hodev contacted Mr. Chickadel to complete the architectural drawings. Because Mr. Chickadel and Hodev were not able to reach an agreement on the price for completing the plans, Hodev hired the firm of Architectural Alliance, Inc. to do so.

16. Believing that the hotel design reflected in the drawings prepared by Mr. Chickadel and his firm complied with all applicable approvals and zoning requirements, Architectural Alliance, Inc. did not

check the Record Plan, which had been sent to the firm, but instead completed architectural drawings for the Radisson based on the design reflected in the preliminary drawings prepared by Mr. Chickadel and his firm.

17. Unlike office or retail space where square footage is the relevant economic measure, hotel economics are determined by the number of rooms and the other services offered. Consequently, the principals of Hodev were focused on the number of rooms and services offered, not square footage, and did not know that the final design exceeded the square footage limitations set forth in the Record Plan seven years earlier.

18. On June 5, 1998, Architectural Alliance, Inc., on behalf of Hodev, filed an application for a building permit with the County. Along with the application, Architectural Alliance, Inc. submitted architectural drawings showing the six-story, full-service hotel with the architect's estimate of gross floor area of 155,480 square feet.

19. On July 21, 1998, approximately 47 days after the submission of Hodev's application for a building permit and after a complete review of the architectural drawings, the County issued Building Permit No. 1953 ("Building Permit") for the construction of a six floor, 155,480 square foot, full-service hotel.

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[1] By Order dated June 30, 2003, the District Court decided to abstain from hearing WH's claims for damages against the County and indicated that the Delaware Superior Court is the appropriate forum for WH's claims.

47. County officials and representatives of WH, including WH's bankruptcy attorneys and attorneys for MSJ Realty Trust, a Bankruptcy Court approved prospective purchaser with no relation or affiliation with WH or its principals, attended a meeting at which the County agreed to issue a temporary certificate of occupancy if WH complied with the terms of a letter from the County Attorney dated February 2, 2001. Pursuant to that agreement and in reliance thereon, WH, its attorneys and engineers proceeded to prepare the documents ("Documents") requested in the February 2, 2001 letter of the County Attorney. WH submitted the Documents to the County and requested a temporary certificate of occupancy in a letter dated November 1, 2001 from WH's bankruptcy attorney to the County.

48. On November 2, 2001, the County issued a letter purporting to revoke the February 2, 2001 letter of the County Attorney. This was done two days prior to a scheduled hearing with WH's lender in Bankruptcy Court, and, upon information and belief, was done with the intent to undermine and interfere with WH's bankruptcy.

49. On November 2, 2001, WH entered into an agreement to sell the hotel to Reese Hotels, LLC, ("Reese") a Pennsylvania limited liability company whose principals were not related to or affiliated with WH or its principals. The Agreement of Sale was subsequently approved by the Bankruptcy Court.

50. Under the terms of the Agreement of Sale,was required to obtain a certificate of occupancy in order for the transaction to close.

51. On November 27, 2001, WH entered into a Stipulation and Settlement Agreement with the Bank

in connection with the Chapter 11 proceeding. The Stipulation and Settlement Agreement was subsequently approved by the Bankruptcy Court.

52. Under the terms of the Settlement Agreement with the Bank, WH could have satisfied its obligation to the Bank by: a) paying the Bank $13,650,000.00 on or before December 31, 2001 or b) paying the Bank $13,850,000.00 on or before March 31, 2002.

53. In a malicious effort to prevent WH from closing on the Reese transaction and thereby recouping some of the financial losses it had sustained, the County arbitrarily refused to issue a certificate of occupancy and refused to cooperate in any manner whatsoever with Reese. Accordingly, WH could not close on the Reese transaction and could not meet its obligation to the Bank.

54. In or about April, 2002, the Bank took title to the hotel.

Count I

42 U.S.C. § 1983

Substantive Due Process

55. WH hereby incorporates by reference paragraphs 1 through 54 above as though fully set forth herein.

56. WH submits that the County's actions were taken in bad faith and for the malicious purpose of depriving WH and its principals of the ownership of the Radisson property and any financial benefit to be derived therefrom. In acting as aforesaid, the County and its officials have engaged in arbitrary and irrational conduct and an egregious abuse of power which shocks the conscience.

57. The County and its officials have acted under color of state law with the intent to unlawfully deprive WH of its property without substantive due process in violation of the Fourteenth Amendment to the United States Constitution.

58. The acts of the County and its officials constitute official policy, custom and practices of the County.

59. As a direct and proximate result of the County's conduct, WH has sustained substantial monetary damages including out of pocket expenditures made in connection with the hotel totaling approximately $8,000,000.00, lost profits which are presently unascertained but believed to exceed $20,000,000.00, the value of the hotel which is presently unascertained but believed to exceed $20,000,000.00, engineering fees, attorneys' fees, court costs and other damages to be established at the trial of this matter.

WHEREFORE, Plaintiff Wilmington Hospitality, LLC demands judgment in its favor and against Defendant New Castle County for: (1) compensatory damages; (2) pre and post-judgment interest; (3) attorneys' fees and court costs; (4) declaratory relief declaring the actions of the County to be violative of the Plaintiff s constitutional rights; and (5) such other and further relief as this Court deems appropriate.

Count II

42 U.S.C. §1983

Equal Protection

60. Plaintiff WH hereby incorporates by reference paragraphs 1 through 59 above as though fully set forth herein at length.

61. The County and its officials have acted under color of state law with the intent to unlawfully

deprive WH of its property in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In this regard, the County and its officials have failed to treat WH in the same manner as similarly situated landowners and developers and the difference in treatment is arbitrary and irrational.

62. The acts of the County and its officials constitute official policy, custom and practices of the County.

63. As a direct and proximate result of the County's conduct, WH has sustained substantial monetary damages including out of pocket expenditures made in connection with the hotel totaling approximately $8,000,000.00, lost profits which are presently unascertained but believed to exceed $20,000,000.00, the value of the hotel which is presently unascertained but believed to exceed $20,000,000.00, engineering fees, attorneys' fees, court costs and other damages to be established at the trial of this matter.

WHEREFORE, Plaintiff Wilmington Hospitality, LLC demands judgment in its favor and against Defendant New Castle County for: (1) compensatory damages; (2) pre and post-judgment interest; (3) attorneys' fees and court costs; (4) declaratory relief declaring the actions of the County to be violative of the Plaintiff's constitutional rights; and (5) such other and further relief as this Court deems appropriate.

Count III

Inverse Condemnation

64. Plaintiff WH hereby incorporates by reference paragraphs 1 through 54 above as though fully set forth herein at length.

65. The County denied WH all economically viable or beneficial use of the hotel property.

66. The County's actions did not substantially advance any legitimate public purpose.

67. In the alternative, the County temporarily denied WH all economically viable or beneficial use of the hotel property.

68. In the alternative, to the extent the County's actions fell short of denying WH all economically viable or beneficial use of the hotel property, the County nonetheless effected a temporary or permanent taking of WH's property without just compensation based upon the economic effect of the County's actions on WH, the extent to which the County's actions interfered with WH's reasonable investment-backed expectations and the character of the County's actions.

69. In acting as aforesaid, the County effected a taking of WH's property without just compensation in violation of the Fifth Amendment to the United States Constitution and Article Section 8 of the Delaware Constitution.

70. The fair market value of the property taken by the County is presently unascertained, but is believed to exceed $20,000,000.00.

WHEREFORE, Plaintiff Wilmington Hospitality, LLC demands judgment in its favor and against Defendant New Castle County for: (1) just compensation damages; (2) pre and post-judgment interest; (3) attorneys' fees and court costs; (4) declaratory relief declaring the actions of the County to be violative of the Plaintiff's constitutional rights; and (5) such other and further relief as this Court deems appropriate.

Count IV

Breach of Contract

71. Plaintiff WH hereby incorporates by reference paragraphs 1 through 54 above as though set forth herein at length.

72. County officials and representatives of WH including WH's bankruptcy attorneys and attorneys for MSJ Realty Trust, a Bankruptcy Court approved prospective purchaser, attended a meeting at which the County agreed to issue a temporary certificate of occupancy if WH complied with the terms of a letter from the County Attorney dated February 2, 2001.

73. pursuant to that agreement and in reliance thereon, WH, its attorneys and engineers proceeded to prepare the documents requested in the February 2, 2001 letter of the County Attorney and otherwise substantially performed their obligations.

74. The agreement to issue a temporary certificate of occupancy was an integral part of WH's bankruptcy reorganization efforts and this was expressed to the County as part of the negotiations to obtain the agreement.

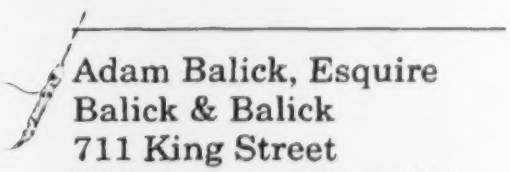
75. The County materially breached the agreement with WH by issuing a letter dated November 2, 2001, purporting to revoke the February 2, 2001 letter of the County Attorney and by failing to issue the temporary certificate of occupancy.

76. WH submits that the breach was engaged in with the malicious intent of interfering with and undermining WH's reorganization efforts before the Bankruptcy Court.

77. As a direct and proximate result of the County's breach, WH has sustained substantial

monetary damages including out of pocket expenditures made in connection with the hotel totaling approximately $8,000,000.00, lost profits which are presently unascertained but believed to exceed $20,000,000.00, the value of the hotel which is presently unascertained but believed to exceed $20,000,000.00, court costs and other damages to be established at the trial of this matter.

WHEREFORE, Plaintiff Wilmington Hospitality, LLC demands judgment in its favor and against Defendant New Castle County for: (1) compensatory damages; (2) pre and post-judgment interest; (3) court costs; and (4) such other and further relief as this Court deems appropriate.



Adam Balick, Esquire
Balick & Balick
711 King Street
Wilmington, DE 19801
Attorney for Plaintiff

Dated: December, 2004

DEPRIVATION OF PROPERTY WITHOUT EQUAL PROTECTION PURSUANT TO 42 U.S.C. § 1983

Wilmington Hospitality alleges a violation of its constitutional right to equal protection as a result of the County's For Wilmington Hospitality to prevail on its an equal protection claim, it must prove four elements.

Wilmington Hospitality must identity other similarly situated landowners; Wilmington Hospitality must prove that New Castle County treated other similarly situated landowners differently; Wilmington Hospitality must prove that New Castle County intentionally treated Wilmington Hospitality differently than other similarly situated landowners; and Wilmington Hospitality must prove that New Castle County had no rational basis for treating Wilmington Hospitality differently.

It is up to you, the jury, to decide what factors are important in making these determinations.

As to the first element of the claim, in determining whether other landowners were similarly situated, you may consider whether a prudent person, looking objectively at the incidents, would consider them similarly situated.

The second element of the claim is that New Castle County treated Wilmington Hospitality differently than the other identified landowners.

For the third element of the claim, intentional conduct means conduct that a person undertook with a knowing desire or with a conscious objective or purpose. If you find that Wilmington Hospitality has failed to demonstrate that the County intentionally

treated it in a different manner than other identified landowners, you must find for New Castle County. If, on the other hand, you find that Wilmington Hospitality has demonstrated New Castle County's intent to treat it differently, then you must find that Wilmington Hospitality has proven this element of its equal protection claim.

For the fourth element of the claim, a rational basis is one that bears a reasonable relation to a legitimate government interest. Wilmington Hospitality bears the ultimate burden of proving that the reasons given by New Castle County for its treatment of Wilmington Hospitality were arbitrary and not rationally related to legitimate interests. If you find that New Castle County had a rational basis for its treatment of Wilmington Hospitality, you must find in favor of New Castle County. If you find that New Castle County did not have a rational basis related to a legitimate government interest, then you must find that Wilmington Hospitality has proven this element of its equal protection claim.

Wilmington Hospitality must prove all four elements to prove its equal protection claim.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C. A. No. 03C-07-213 MMJ

WILMINGTON HOSPITALITY, LLC,
a Delaware limited liability company,
Plaintiff,

v.

NEW CASTLE COUNTY, a political subdivision of the State of Delaware,
Defendant,

SPECIAL VERDICT FROM DEPRIVATION OF PROPERTY WITHOUT EQUAL PROTECTION PURSUANT TO 42 U.S.C. 9,933

Do you find that plaintiff Wilmington Hospitality has proved by a preponderance of the evidence:

1. That Wilmington Hospitality identified other similarly situated landowners?

ANSWER: YES ___ NO ___

2. That New Castle County treated other similarly situated landowners differently?

ANSWER: YES ___ NO ___

3. That New Castle County intentionally treated Wilmington Hospitality differently than other similarly situated landowners?

ANSWER: YES ___ NO ___

4. That New Castle County had no rational basis for treating Wilmington Hospitality differently?

ANSWER: YES ___ NO ____

If you answered "no" to any of the Question 1, 2, 3, or 4 go to Question 6.

If you answered "yes" to all Questions 1 through 4, continue to the next question.

5. What amount of damages, if any, do you find that Wilmington Hospitality should be awarded for its equal protection claim?

ANSWER: YES ___ NO ____

BREACH OF CONTRACT

6. Do you find that Wilmington Hospitality has proven by a preponderance of the evidence that a contract was formed on September 25, 2001 whereby New Castle County agreed to issue a temporary certificate of occupancy?

ANSWER: YES ___ NO ____

7. Do you find that Wilmington Hospitality has proven by a preponderance of the evidence that New Castle County breached it-contract to grant Wilmington Hospitality a temporary certificate of occupancy?

ANSWER: YES _____ NO___

8. If you answered "Yes" to both Questions 6 and 7, what amount of damages, if any, do you find that plaintiff Wilmington Hospitality should be awarded for its breach of contract claim?

ANSWER: YES ___ NO ____

The foreperson should sign the verdict sheet and inform the Bailiff that a verdict has been reached.

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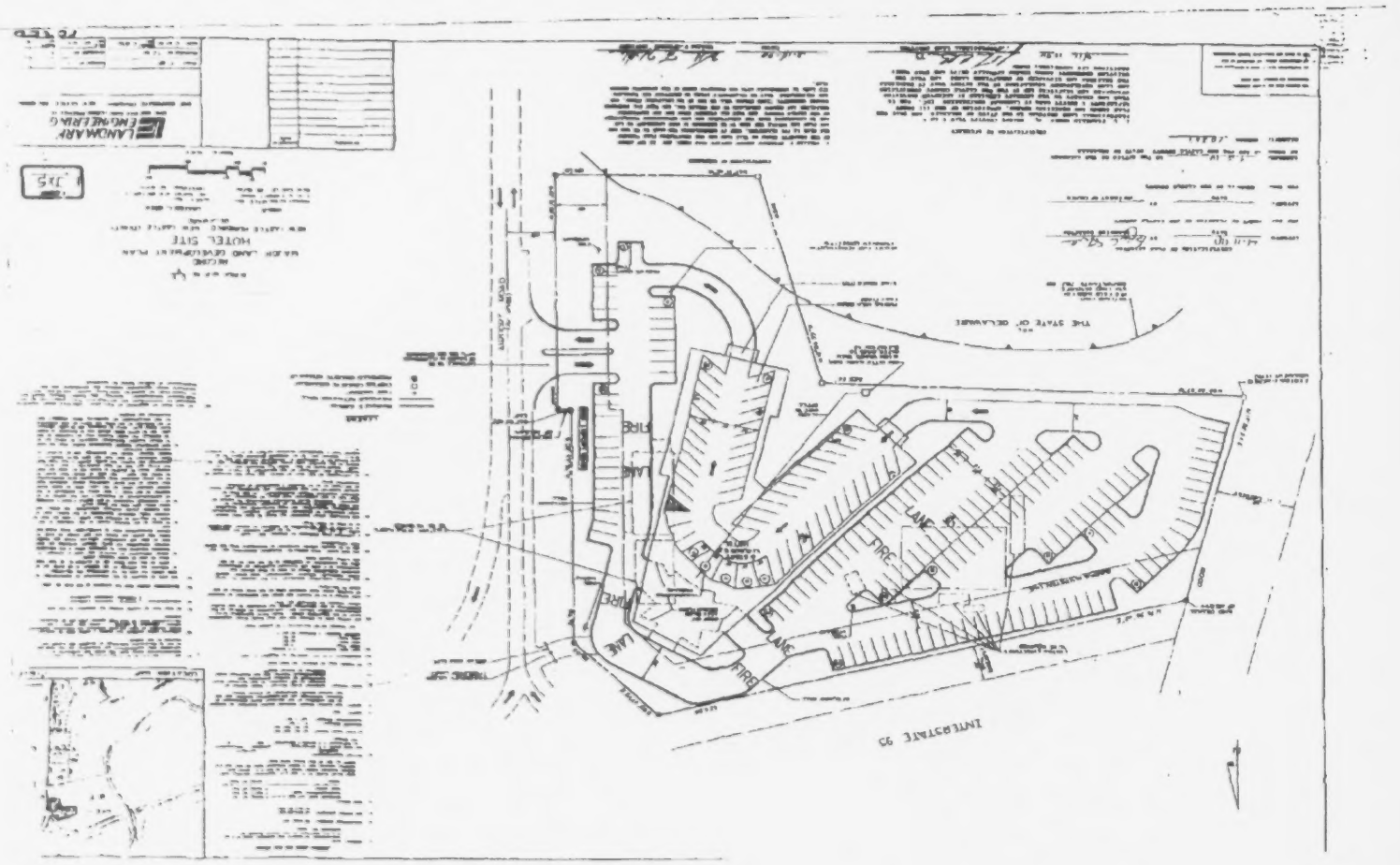


BOARD OF ADJUSTMENT
2701 CAPITOL TRAIL
NEWWARK, DELAWARE 19711
(302) 368-7780 ext. 227

NOTICE OF DECISION

REFERENCE: Application 97-1094-A

DATE DECISION FILED: OCTOBER 10, 1997

APPLICANT: 326 ASSOCIATES, L.P. (TRUSTEES OF NEW CASTLE COMMON)
1201 Orange Street
Ste. 700
Wilmington DE 19801

PUBLIC HEARING DATE: October 2, 1997

DATE OF DECISION: October 2, 1997

REQUESTED: Applicant requested area variance from the required 49 parking spaces to maintain an existing fast food restaurant with 40 parking spaces; 112 North Dupont Highway, New Castle; C-2 zoning; CD 6; New Castle Hd.; Tax Parcel #10-024-00-053-T0008.

The Board of Adjustment may grant a variance from the area or dimensional requirements of the County Code where it finds the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific-standards of the Zoning Code applicable to the subject property.

In late August, applicant was involved in a financial transaction which needed verification that the zoning use/record plans were consistent with applicable zoning and subdivision regulations. As an outgrowth of this, it was discovered the building and number of

parking spaces did not conform with the recorded major land development plan for the site (Microfilm 7778, recorded 10/9/85). The record plan shows a 2,580 sq. ft single story restaurant located on Lot 5 with a total of 43 parking spaces based upon 25 spaces, plus one space per 150 sq. ft of building area. In actuality, a 3,470 sq. ft. single story restaurant was constructed with 40 parking spaces (49 spaces are required with a 3,470 sq. ft. building). Research has not resolved the question of why the building was not built according to the recorded plan.

The exceptional practical difficulty applicant is experiencing is that he has been operating for the past 11 years under the assumption that all regulations/ requirements of the County had been met, and was not aware of the two discrepancies, because parking has never been an issue.

It was noted that 68% of the restaurant's business is drive-thru, and that adequate parking exists on site, even when the adjoining Farmer's Market is in operation on Friday, Saturday and Sunday.

Applicant is requesting a variance to allow what is on the site to remain Applicant was unaware of the technical violation for 11 years and during that time there have been no problems with inadequate parking.

The Board of Adjustment is convinced the applicant is suffering exceptional practical difficulty so as to justify the relief requested. The requested dimensional change is minimal, and the harm to the applicant if the variance is denied, would be greater than the probable effect on neighboring properties if it is granted. Therefore, the Board takes action to grant this application in accordance with the attached plan.

VOTE: 3-0 (Grant: Marconi, McWilliams, Kellam)

BOARD OF ADJUSTMENT OF
OF NEW CASTLE COUNTY

/s/_____
Thomas C. Marconi CHAIRMAN

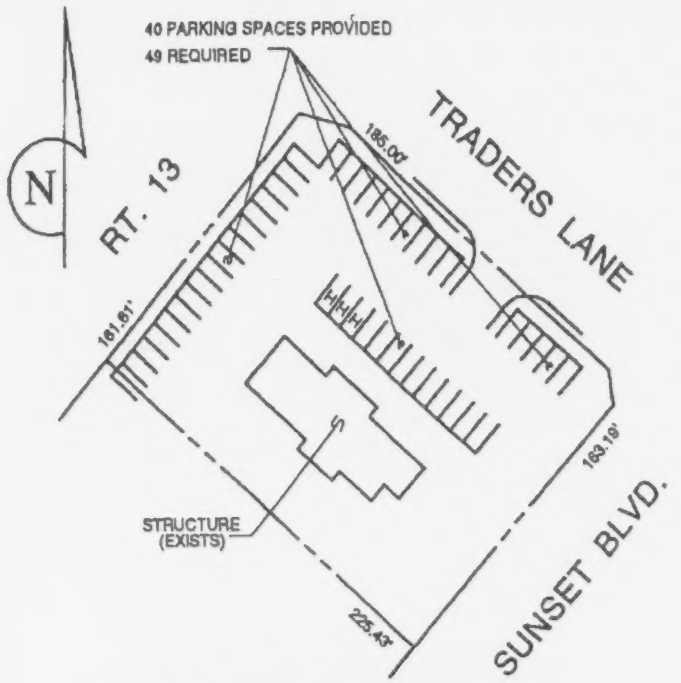
GF/dmw

October 6, 1997

NOTE: Application is granted subject to compliance with easements and private deed restrictions. This is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the Division of Development and Licensing prior to construction or establishment of the use. This decision should be kept in a safe place with the property deed. This decision may be appealed to the Superior Court within thirty (30) days of filing in the Office of the Board by any person aggrieved by it.

NOTE: A variance becomes void if the variance is not put into effect within a two (2) year time period from the expiration of the appeal period following the date of filing of the decision.

PUBLIC HEARING DATE: 10/2/97 ZONING: C-3 APPLICATION NO: 97-1084-A
COUNCILMANIC DISTRICT: 6 PLANNING DISTRICT: 2 TAX PARCEL NO: 10-024-00-053T0008



BOARD OF ADJUSTMENT
NEW CASTLE COUNTY, DELAWARE

NAME AND ADDRESS OF APPLICANT

326 ASSOCIATES, L.P. (TRUSTEES OF NEW CASTLE COMMON)
1201 Orange Street
Wilmington DE 19801

APPLICANT SEEKS:
VARIANCE: Required Parking Spaces
SPECIAL EXCEPTION:
TEMPORARY PERMIT:
OTHER:

NCC 00060

DECISION: GRANTED HUNDRED: New Castle
DATE OF DECISION: October 2, 1997 SCALE: 1" = 50'

JUN-26-98 12:59 PM

EXHIBIT
JX 17

NEW CASTLE COUNTY
APPLICATION FOR BUILDING PERMIT

Parcel Number 10 013 00 001 [ ] [ ] Rec'd Date 1 1

JOB LOCATION

No. ____ Street 295 & AIRPORT ROAD Suite ____ Bldg. ____

Lot ____ Subdivision ____ Section ____ Zoning ____

IDENTIFICATION

Applicant Name ARCHITECTURAL ALLIANCE Phone #(302)-655-5800

Street SUITE 41, 5223 W. WOODMILL DRIVE City WILM. State DE Zip 19808

Owner Name WILMINGTON HOSPITALITY Phone #(302)-652-5815

Street 1001 CONCORD PIKE, SUITE 1A City WILM. State DE Zip 19801

Contractor Name ____ Phone #( ) - -

Registration # ____ Warranty Code ____

I, the undersigned, own the above referenced property or act as authorized agent for the owner

Applicant signature [signature] Date 6/15/98

Please give a brief description of the proposed construction

6 STORY HOTEL

Square footage of Living Area ____ 155,480 Square footage of Building

Foundation
- ☐ Slab on grade
- ☐ Crawl space
- ☐ Basement
- ☐ Other ____

Framing Type
- ☐ Wood
- ☑ Steel
- ☐ Masonry
- ☐ Other ____

Required Certificates
- ☑ Occupancy
- ☑ Use
- ☐ Completion
- ☑ Elevator
- ☐ None

Required Accessory
- ☑ Plumbing
- ☑ HVAC
- ☑ Sewer
- ☑ Lateral
- ☐ None

Fees

Valuation (Sale Price)	6,000,000
Permit Fee	24,500
Zoning Permit	100
Certificate	40
Lines & Grades	[illegible]
Total Fees	24,665

☐ Cash
☐ Check
Check Amount

Approval Record (Office Use Only)

Plan Review			Thermal Calcs	1	ASPHALT	Board of Health	
Site/Zoning		$24.66	Entrance/Exit		NC3098	Septic Approval	
Record Plan		10356	Fire Marshal	1		Board of Adj.	
Hist. Review		[illegible]	Utility Dec.		[illegible]	Well Approval	
Transfer Tax						Required Acc.	

Validation ____ / / Plan Examiner Date

[illegible] 53 ____ ____ 07/21/98 Permit Number Type Use Issue Date

000376

NEW CASTLE COUNTY
DIVISION OF DEVELOPMENT AND LICENSING
NON-RESIDENTIAL PLAN REVIEW

The following comments resulted from a review of your plans for compliance with the ECCA National Building Code/1990 as adopted by New Castle County. Compliance to these comments will be verified during construction by the Inspection Office. Failure to comply with approved plans or making unauthorized field changes can result in Stop Work Orders and additional review fees. Questions concerning this review will be answered by the Permit Office at 366-7760.

Plan Review Number 98-247

Parcel Number 10-013.00-001

Plan Examiner Dare Streets Sr.

Date 6/5/98

Project Plaza Suite Hotel

Const.Type 2-A

Use Group(s) R-1

Suppression Y ☑ N☐

Tabular area 22800

Suppression increase 200% 25% Reduction

Street frontage increase 150%

Total Allowable Area 47,424

Actual Area 28,000+/Floor

Allowable number of stories 9(100)

Actual number of stories 7

Occupant Loads Area 1 (_____) _____

Area 2 (_____) _____

Area 3 (_____) _____

Total _____

✓ 1. Handicapped accessibility shall be in accordance with ANSI, A117.1 Standards. This shall include, but not be limited to: lever hardware on all doors in accessible areas, proper location of grab bars and fixtures, ramp slopes, etc.

✓ 2. All means of egress doors shall be readily openable from the side from which egress is made without use of key or special knowledge.

✓ 3. All means of egress shall be indicated by illuminated exit signs. Directional signs shall be provided where needed to indicate path of egress. All signs shall have red letters, a minimum or 6" in height, and by connected to an emergency power source.

✓ 4. Emergency lighting shall be provided for all paths of egress.

✓ 5. Handrails an stairways shall be set at between 34 inches and 36 inches above nosing of the treads and project not more than 3 1/2 inches into the required stair width. Handrails shall have a circular cross section with an outside diameter of 1 1/4 inches to 2 inches. Handrail ends, at top of stairs, shall extend at least 12 inches beyond top riser, and travel parallel with the floor. Hand rail ends, at bottom, shall continue to slope far the depth of one riser and continue parallel with the floor for at least 12 inches. Handrail ends shall be returned to a wall or post.

✓ 6. All penetrations of fire rated assemblies (i.e. walls, floor/ceiling assemblies, etc.) shall be fire-stopped with materials designed for the specific application. Ducts shall be equipped with fire dampers.

✓ 7. Prior to issuance of the Certificate of Occupancy, Certificates of Compliance(s) must be obtained for all elevators and lifts.

✓ 8. Special Inspection Reports shall be provided in accordance with section 1308.0. Prior to commencing construction, a schedule of proposed inspection shall be submitted along with the name of the firm or individual responsible for the inspections.

Additional comments

9. Kitchen Fit Out Separate Permit

NEW CASTLE COUNTY
87 Reads Way
New Castle, DE 19720
(302)395-5400 Fax (302)395-5444

COMMERCIAL BUILDING PERMIT

Report Date 07/21/1998 08:40 AM Submitted By Page 1

A/P # 1953 Type COMMBLDG Issued Date 07/21/1998 Issued By 06091

Parcel 1001300001

Location AIRPORT RD & BASIN RD
Owner INC HODEV Phone
Address 1 S OLD BALTIMORE PIKE
NEWARK DE 19702

Applicant's Full Name INC HODEV Address 1 S OLD BALTIMORE PIKE
Day Phone Fax NEWARK DE 19702
Pager

CERT OF OCCUPANCY FEE	40.00
COMMERCIAL BLDG PERMIT FEE	24526.00
CONNECTION FEE	101.00
ZONING PERMIT FEE	100.00
WWTPE	28054.00
D-28 SOUTH CHRISTINA	15681.00
MISCELLANEOUS FEE(S)	80.27.50
Total	79439.50

Declared Value 6000000.00 Type of Work
Calculated Value 0.00 Square Footage 0.00
Action Value 0.00

Remarks
ABSTRUCT 6 STORY HOTEL WITH PARKING BELOW

Signature of Owner / Owner Builder Date Signature of Contractor / Owner Builder QC0279

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[LOGO]

DEPARTMENT OF LAND USE

NOTICE OF DECISION

Reference: Application 00-0534-A

DATE DECISION FILED: June 28, 2000

Applicant: KRISHNAS, LLC
L/O Frank & Maryann Staffieri
611 Green Spring Drive
Bear, DE 19701

Public Hearing Date: June 15, 2000

Date of Decision: June 15, 2000

REQUESTED: Applicant requested an Area variance from the gross floor area ratio of 0.50 to permit a ratio of 0.53817, permitting the construction of a 31,413 square foot hotel (2,228 larger than permitted by Code); 1024 Old Churchman's Road, Newark; CR Zoning; CD 1; Tax Parcel Id. 09-018.00-020 & 050.

The Board of Adjustment may grant a variance from the area or dimensional requirements of the County Code where it finds the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code applicable to the subject property.

The Applicant's property consists of a 1.34-acre parcel of land located on Old Churchman's Road in Newark. The applicant proposes to construct a 55-room hotel at this site with an accompanying parking garage. Construction has started at the site and a portion of the foundation has been erected. The County has issued a stop-work order for the project, however, as it discovered discrepancies in the appli-

cation filed for the building permit One of these discrepancies was the realization that the hotel being constructed was actually larger than the structure depicted on the record plan. The hotel being constructed is 2,228 square feet larger than permitted by Code and 3,063 square feet larger than depicted on the plan

The applicant presented testimony through the project engineer and the hotel owner. It was the applicant's position that the discrepancy resulted from an innocent mistake. It is apparent that the construction documents submitted to the County for obtaining the building permit were different than the record plan approved by the County. A variance is one method to rectify this problem; another is to knock out a portion of the building to reduce the square footage. This change in square footage will not result in any loss of room space, indeed, the increased square footage, if permitted, would not result in additional rooms in the hotel. The problem occurred during the transmission of the plans from the engineer to the architect. Apparently, according to the applicant's testimony, the engineer failed to transfer to the architect the numerical restrictions imposed by the record plan. The discrepancy may have also been related to the fact that the footprint for the proposed structure may have been derived from a building plan which was slightly different flout the structure the applicant desires to construct It was admitted that the architect never examined the record plan to confirm the accuracy of the numbers and the County did not uncover the error when it issued the building permit. Correction of this error, other than through a variance, would be difficult. Several area residents or business owners submitted letters of support for this project and several more testified in support of the

application. Their unrefuted testimony was that the variance would not be noticeable and would not adversely impact the area

Attorneys for the former general contractor presented opposition to this request. At the outset, the applicant objected to the testimony, claiming that the objector did not have standing to raise its opposition. The Board permitted the testimony, finding that arguable standing existed to present the opposition as the objector apparently had a financial interest, directly tied to the construction of the project, which may have been adversely effected by a decision in this matter. During the testimony, however, in addition to legal argument on the claim of self-created hardship, the representatives made a number of factual allegations concerning fraud, intent and deception. These allegations were made without the benefit of witness testimony or documentary support Pursuant to *New Castle Development Co. v. Board of Adjustment,* Del. Super., C.A.No. 96A-02-006, Herlihy, J. (August 13, 1996), such factual arguments of counsel, without documentary evidence or witness testimony to support it, can not be relied on by the Board in making its decision. To that end, the Board has disregarded allegations of fraud in this case.

Instead, the Board has considered the arguments raised by counsel concerning the doctrine of self-created hardship. Counsel raised substantial arguments on this point. In particular counsel noted that construction undertaken in violation of the zoning code is done at the contractor's own risk and that mistake, innocent or not, cannot be the basis for a variance. *Weaver v. Board of Adjustment*, Del.Super., C.A. No. 90A-07-10, Toliver, J. (October 28, 1991). While recognizing the validity of this doctrine, the

Board also recognizes that every application before it generally contains some form of self-created hardship. Dexter v Board of Adjustment, Del.Super., C.A. No. 96A-03-003. The present matter has some elements that would meet the general test for a self-created hardship. The County approved one set of plans, however, a different set was submitted in order to obtain the building permit. This mistake was wholly the responsibility of the applicant and the evidence showed that it was the result of human error.

The Board votes to grant the requested valiance. The requested dimensional change is truly minimal (approximately 4% greater than permitted and 7% larger than depicted on the record plan) and the harm to the applicant if the variance is denied would be greater than the probable effect on neighboring properties if the variances was granted. The granting of this variances will not cause substantial detriment to the public good, nor will it substantially impair the intent and purpose of the zoning code. On this note, the Board specifically acknowledges the fear that some may have that a decision such as this could encourage people to violate the Code. This decision is very fact specific. While allegations of fraud were levied on the applicant, no competent evidence was introduced to support this claim. Moreover, and perhaps more compelling the scope of the relief requested was truly retained end, from the evidence presented, resulted in no appreciable harm to the surrounding community

VOTE: 3-2 (Great; Clark, Kellam, Marconi; Deny: Hardman Rake)

BOARD OF ADJUSTMENT
OF NEW CASTLE COUNTY

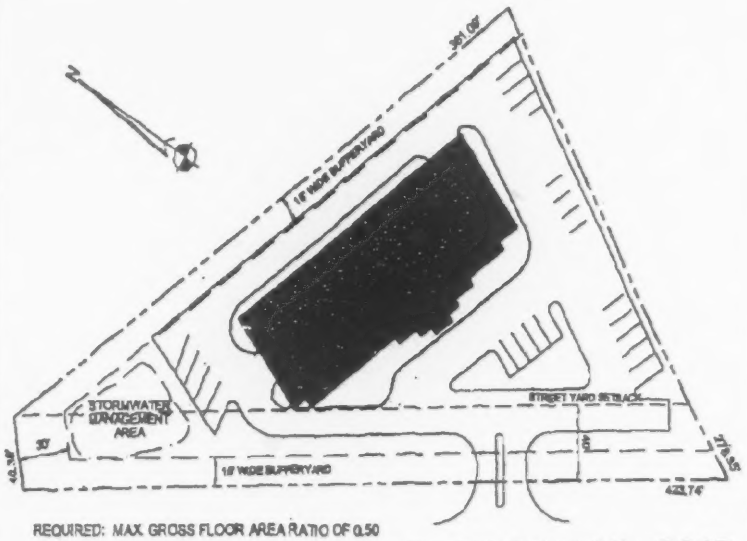
/s/ TCM

Thomas C Marconi
Chairman

NOTE: This variance is neither a building permit nor a Certificate of Occupancy. Appropriate [eligible] must be obtained from the Division of Development and Licensing prior to construction or establishment of the use. This decision should be kept in a safe place with the property deed. This decision may be appealed to the Superior Court by any person aggrieved by it within 30 days of its filing in the office of the Board of Adjustment

NOTE: A variance becomes void if the variance is not put into effect within a. two (2) year time period from the expiration of the appeal period following the date of filing this decision.

PUBLIC HEARING DATE: 6-15-00 ZONING: CR APP. NO. 00-0534-A
COUNCILMANIC DISTRICT: 1 PLANNING DISTRICT: 9 TAX PARCEL: 0901800020



REQUIRED: MAX. GROSS FLOOR AREA RATIO OF 0.50
PROVIDED: GROSS FLOOR AREA RATIO OF 0.53817 OLD CHURCHMANS ROAD

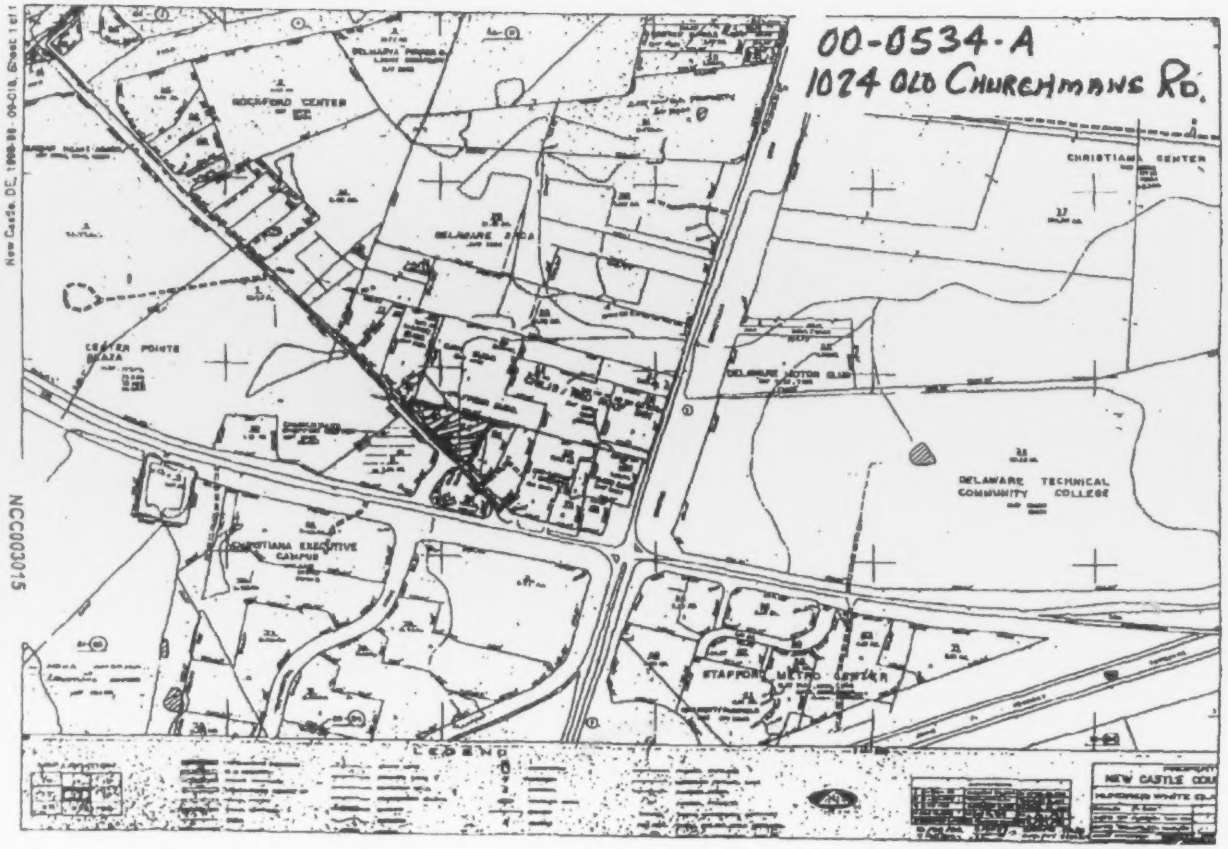
BOARD OF ADJUSTMENT
NEW CASTLE COUNTY, DELAWARE
NAME AND ADDRESS OF APPLICANT

Krishnas, LLC
611 Green Spring Drive
Bear, DE 19701

APPLICANT SEEKS: VARIANCE: Maximum gross floor area ratio
SPECIAL USE:
TEMPORARY PERMIT: NCC00030'4
OTHER:

DECISION: Grant
DATE OF DECISION: 6-15-00

HUNDRED: White Clay Creek
SCALE: 1" = 60'


00-0534-A
1024 OLD CHURCHMANS RD.
ROCKFORD CENTER
CHRISTIANA CENTER
DELAWARE TECHNICAL COMMUNITY COLLEGE
CHRISTIANA EXECUTIVE CAMPUS
STANTON METRO CENTER
LEGEND
NCC00301S

No. 08-1182

IN THE

Supreme Court of the United States

WILMINGTON HOSPITALITY, LLC,
Petitioner,

v.

NEW CASTLE COUNTY,
Respondent.

Petition for a Writ of Certiorari to the Delaware Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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April 23, 2009

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QUESTIONS PRESENTED

1. With respect to the equal protection claim:

a. Did the Delaware Supreme Court correctly determine that Petitioner had failed to prove that it was similarly situated to other landowners, especially when, unlike all the identified comparators, Petitioner had acted in bad faith by intentionally building a hotel substantially larger than authorized, and by otherwise ignoring Building Code restrictions?

b. Was there an alternative, independent basis for the Delaware Supreme Court's rejection of Petitioner's claim when Petitioner failed to prove that Respondent lacked a rational basis for the actions of which Petitioner complains?

2. Did the Delaware Supreme Court err in ruling that a jury could not find that the evidence that Petitioner introduced was sufficient to establish that Respondent had acted arbitrarily or irrationally?

3. Does this Court have jurisdiction to hear a claim that the trial court erred, based on a substantive argument different from the argument made below, in denying a motion to amend a complaint, pursuant to Delaware procedural rules?

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NEW CASTLE COUNTY,
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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In April 1990, the predecessor to Petitioner, Wilmington Hospitality, LLC ("WH"), obtained approval from Respondent, New Castle County, for a record plan authorizing it to build a hotel 118,805 square feet in size. App. 58a.[1] WH's architect designed a

[1] The Appendix to Wilmington Hospitality's Petition is referred to as App._____. The opinion of the Delaware Supreme Court, which Petitioner asks this Court to review, is set forth at pp. 56a-68a of that Appendix. All record citations in this Brief in Opposition are taken from that opinion, except whereas otherwise specifically noted. By contrast, most of Petitioner's citations to the record come from its appendix filed in the Delaware Supreme Court. See note 2 at p.3 of the Petition and pp. 2-24, *passim*. Many of these "facts" were not

hotel that was substantially larger than the record plan authorized. *Id.* The project was delayed for several years, and in 1998 WH applied for and obtained a building permit from the County for a 155,480 square foot hotel. *Id.*

In May 2000, County inspectors determined that the nearly-completed hotel was inconsistent with the record plan in several ways: It was larger than authorized. It contained banquet halls, meeting rooms, and other facilities that would necessitate additional parking. It included a kitchen for which no building permit had been issued. *Id.* The County revoked the building permit as a result of this discovery. *Id.*

WH applied to the County Board of Adjustment for nine variances, which, if granted, would have allowed it to obtain the certificate of occupancy necessary to open the hotel. App. 59a. After a two-day hearing, the Board denied the variances. *Id.* The Board's factual findings and legal conclusions, which the Delaware Supreme Court found were supported by the evidence, included a finding that WH knew it was overbuilding and acted in bad faith. App. 63a-64a, 67a-68a.[2] WH noticed an appeal in the Delaware Superior Court of the Board's decision denying the

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adopted by the Delaware Supreme Court. For example, the court relied on the fact that the Board of Adjustment rejected WH's application for variances. App. 59a, 63a-64a, 67a-68a. The Petition cites to the testimony of the one member of the Board who dissented from that decision. Pet. at 9-10. The court never mentioned and apparently attached no significance to this dissenting view.

[2] The Board of Adjustment's Notice of Decision is set forth at App. 69a-92a. The Board's discussion of WH's bad faith is found at pp. 84a-86a of that Notice of Decision.

variances. App. 59a. WH also filed an action in the Delaware Court of Chancery seeking a mandatory injunction compelling the County to issue a certificate of occupancy. *Id.* The Court of Chancery denied WH's motions for a temporary restraining order and for a preliminary injunction. *Id.* It set the case for a trial on the merits for November 28, 2000, but the day before the trial WH notified the court that it was not ready to proceed. App. 59a-60a. It never prosecuted the Chancery action, which was ultimately dismissed. App. 60a. WH also abandoned its appeal in Superior Court of the Board's denial of the variances and presented no evidence questioning the Board's fairness or impartiality. App. 68a.

In 2003 WH filed an action in Delaware Superior Court against the County alleging 42 U.S.C. § 1983 violations of substantive due process and equal protection, a taking without just compensation (inverse condemnation), and breach of contract. App. 61a.[3] The Superior Court dismissed the substantive due process and inverse condemnation claims. *Id.* WH then sought to amend its complaint to allege a temporary or partial taking by the County. Its motion was denied. App. 61a-62a. At trial the jury found for the County on the breach of contract claim but awarded WH $7.5 million in damages on its equal protection claim. App. 62a.

The County appealed to the Delaware Supreme Court, which reversed the Superior Court verdict on the equal protection claim on two independent grounds. WH's equal protection claim was a "class of

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[3] Prior to filing that action, WH brought a similar action in the United States District Court for the Eastern District of Pennsylvania, which dismissed the complaint on the County's motion. Mem. Op. of the Super. Ct. (Aug. 4, 2004), App. 5a-6a.

one" claim arising from this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The Delaware Supreme Court interpreted *Olech* as requiring two necessary elements that WH would have to prove to establish an equal protection claim: (1) that there were land owners similarly situated to WH who were treated differently, and (2) that the County had no rational basis to treat WH as it did. App. 62a. The court held that WH had failed as a matter of law to prove that there were similarly situated comparators. App. 63a-67a. It further held that WH had failed to prove the second element, that the County had no rational basis for its actions. App. 67a-68a. WH also cross-appealed the Superior Court's denial of its motion to amend its complaint to state a partial takings claim. The Delaware Supreme Court summarily rejected this cross-appeal and affirmed the Superior Court. App. 68a.[4]

REASONS FOR DENYING THE PETITION

I. In reversing the Superior Court, the Delaware Supreme Court applied the appropriate standard to determine whether there were similarly situated comparators and also reversed the Superior Court on the independent ground that there was insufficient evidence to support a finding that the Respondent County lacked a rational basis for its actions.

a. WH has sought to manufacture a certiorari-worthy issue by asserting a difference between this

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[4] Although not raised by WH in its Petition, the Delaware Supreme Court also summarily denied WH's cross-appeal of the Superior Court's dismissal of its substantive due process and inverse condemnation claims. App. 68a.

Court's "similarly situated" language in *Olech*, 528 U.S. at 564, and language quoted by the Delaware Supreme Court from *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002), which equates "similarly situated" comparators with comparators that are "*prima facie* identical in all relevant respects." As the Delaware Supreme Court noted, these are simply two different ways of saying the same thing. App. 62a. The Seventh Circuit's "*prima facie* identical in all relevant respects" is a sensible explanation of "similarly situated." In *Olech*, the claim was that Mrs. Olech was required to give the village a 33-foot easement in order to be connected to the municipal water supply, while all other property owners were required to give only a 15-foot easement. *Olech*, 528 U.S. at 563. Undoubtedly these other property owners and their properties differed from Mrs. Olech and her property in many respects, but in the relevant respect of seeking to connect to the water supply, they were essentially identical.

WH cites this Court's opinion in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and in *Williams v. Vermont*, 472 U.S. 14 (1985), to support its position that "similarly situated" means something different than "*prima facie* identical in all relevant respects." Pet. at 25-27. But this Court's language in *Garrett*, which WH cites with approval to support its position, is very similar to the language WH eschews: "similarly situated in relevant respects." 531 U.S. at 366 n.4.[5] The

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[5] *Garrett* has little, if anything, to do with this case. It held that state employees are prohibited by the Eleventh Amendment from recovering money damages by reason of a state's failure to comply with the Americans with Disabilities Act. WH

language in *Williams*, of which WH approves, is also quite similar: "similarly situated for all relevant purposes." 472 U.S. at 23. Further, while the Delaware Supreme Court did quote the "prima facie identical" language from *Purze*, WH argues that the court actually applied a pre-*Olech* standard of "identically situated in all relevant respects rationally related to the government's mission." Pet. at 26 (quoting *Purze*, 286 F.3d at 455). Even assuming this is different from the *Olech* standard, it is not the standard that the Delaware Supreme Court applied; at no place in its opinion did the court cite this language.

In fact the Delaware Supreme Court only quoted the *Purze* language, "*prima facie* identical in all relevant respects," once in its opinion (App. 62a) and equated it with "similarly situated" and with "an extremely high degree of similarly," quoting *Cordi-Alien v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007). These formulations do not constitute different standards, but are simply different ways of conveying the concept that an equal protection claim, in the absence of a suspect classification, requires a high degree of similarity, particularly among property owners who are allegedly the recipients of different treatment in zoning or land use decisions. Such decisions are an appropriate exercise of governmental discretion and are difficult to compare because properties—at different locations and of different sizes—differ. Unless courts and juries are going to routinely second-guess executive branch zoning decisions and decisions on the permitted uses of land, equal protection review is generally inappropriate. Accordingly, the barriers to

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cites to language in a footnote to *Garrett*, describing a ruling in another case applying the basic principles of rational review. Pet. at 26-27.

such review are purposefully high. Zoning and land use decisions are a proper exercise of the authority of the executive branch and not matters for judicial review under equal protection analysis except in the most egregious cases.

In this case, under the most lenient standard of similarity, there was no identified land owner similarly situated to WH. WH's first argument or reason for granting its Petition ignores a unique aspect of this case that the Delaware Supreme Court found to be dispositive as to the "similarly situated" question: WH's bad faith. In explaining why WH failed to prove there were similarly situated comparators, the Delaware Supreme Court wrote, "The Board [of Adjustment] found, based on documents and testimony of numerous witnesses, that WH did not act in good faith" in building a hotel substantially larger than was authorized by the record plan. App. 63a-64a. Although there were many other factors that prevented the comparators from being similarly situated to WH, they need not be considered because none of the alleged comparators acted in bad faith. App. 66a-67a. Under any test that might be applied, there were no similarly situated comparators.

b. The Delaware Supreme Court had an alternative, independent ground for its ruling: Even if the comparators were similarly situated, WH produced insufficient evidence for a jury to conclude that the County lacked a rational basis for its actions. App. 67a-68a. The court ruled that the Board of Adjustment "denied WH's application for variances based on factual findings and legal conclusions supported by the evidence, including a finding that WH knew it was overbuilding and acted in bad faith." App. 67a-68a. Thus the Board had a rational basis to

deny the variances. WH noticed but then abandoned an appeal from the Board's decision, leaving that decision as final and unchallenged. Aside from the Board's decision, the court found that the other conduct of which WH complained in its equal protection claim, the County's (as opposed to the Board's) refusal to cooperate with it to open the over-built hotel, also had a rational basis.

> The County was under no obligation, to assist WH in working its way out of this self-created dilemma. From the County's perspective, WH had tried to "get away" with ignoring the [Building] Code, and it was not going to help WH by making concessions or granting temporary [certificates of occupancy].

App. 68a.

In sum, there was an alternative, independent ground for the Delaware Supreme Court's rejection of WH's equal protection claim: Its failure to produce evidence sufficient to show the absence of a rational basis for the County's actions. Even if WH were correct with respect to its argument about the "similarly situated" test, the result in this case would be the same. Its equal protection claim could not withstand summary judgment.

II. The Delaware Supreme Court did not rule that evidence of the Respondent County's overall treatment of Petitioner WH was inadmissible or irrelevant to the equal protection claim, but only that it was insufficient to establish arbitrary conduct by the County.

WH's second argument or reason for granting the Petition distorts a ruling on sufficiency of the evi-

dence into an issue of admissibility. The caption for this second argument (Pet. at 28) would lead the reader to believe that the Delaware Supreme Court had ruled that evidence of the County's overall treatment of WH should be excluded from evidence. In support of its position, WH cites *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), a case that primarily concerns the Seventh Amendment right to a jury trial in a § 1983 action asserting a regulatory takings claim. *Del Monte Dunes* was not an equal protection opinion; although the plaintiff had presented an equal protection claim, the Court of Appeals, and this Court, did not address that claim. *Id.* at 701-702. This Court did rule that it was proper to submit to the jury in a takings case the question whether the city's decision to deny a developer's final proposal was reasonably related to the city's proffered justifications. *Id.* at 706.

WH asserts that the Delaware Supreme Court's ruling was that evidence of the County's conduct was irrelevant once the Board of Adjustment had determined that WH had acted in bad faith and that, therefore, the jury would be precluded from considering that conduct. Pet. at 29. The Delaware Supreme Court opinion at no place discusses the admissibility of evidence relevant to allegations that a government has behaved arbitrarily or irrationally. What the court did rule was that after WH acted in bad faith to build a hotel substantially larger than was authorized, as a matter of law a jury could not find that the specific evidence which WH produced—refusing to assist and opposing WH's opening the hotel—established arbitrary or irrational conduct. App. 67a. A jury could not rationally find that it was arbitrary for the County, faced with a developer who "had tried to 'get away' with ignoring the [Building] Code," as the

Board of Adjustment had found, (1) to insist either that WH bring the building into compliance or sell the hotel to an untainted owner; (2) not to help WH work its way out of its self-created dilemma; or (3) not to help WH by making concessions or granting temporary certificates of occupancy. App. 68a.

The court specifically found that in the context of a bad faith developer, a jury could not find that there was sufficient evidence of irrational or arbitrary conduct based on (1) the County Executives expression of his dislike for WH's principals; (2) the County's insistence that WH either tear down or foam in the top two floors of the hotel to bring it into compliance with the Code; or (3) the County's insistence that if the hotel were sold, safeguards be in place to ensure that the principals of WH and their families did not retain any interest in the hotel, thereby benefiting from their bad faith conduct App. 67a. The court said nothing about whether evidence to support these factual allegations should have been admitted in this case or in future cases. Rather it said that the evidence that was admitted in this case was insufficient to establish that the County had no rational basis for its conduct. App. 67a-68a.

This is a highly fact-specific ruling on summary judgment that has little or no implications for other cases. It does not establish any standard of admissibility or limit the jury's consideration of the evidence. It simply holds that in this factual context, summary judgment should have been granted because no rational finder of fact could conclude that the County acted arbitrarily. App. 68a.[6]

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[6] WH also argues that because the Delaware Supreme Court relied on WH's bad faith in rejecting its arbitrary conduct

III. Petitioner WH has raised a different issue before this Court with respect to whether it should have been permitted to amend its complaint, under Delaware procedural rules, than the partial takings issue it raised on its motion in the trial court.

WH's last reason in support of its Petition is based on the Delaware Superior Court's denial of its motion seeking leave to amend the complaint to state a partial takings claim after its intial inverse condemnation claim had been dismissed—an argument so unsubstantial that the Delaware Supreme Court summarily rejected it. App. 68a. Because the Delaware Supreme Court did not discuss the issue, in order to understand why this motion to amend was denied, it is necessary to refer to a ruling of the Delaware Superior Court, the trial court. That court's Memorandum Opinion of May 24, 2005 (App. 20a-27a) reveals that the issue that WH seeks to raise before this Court is not the issue that was ruled on by the Superior Court when it denied the motion for leave to amend.

Before this Court, WH now claims that the alleged taking was the County's insistence that opening the hotel be conditioned upon a deed restriction or some other provision prohibiting WH's principals and their families from having any ownership in the hotel for

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contention as well as its similarly situated contention, it conflated the two prongs of the *Olech* analysis. (Pet. at 29.) To the contrary, WH's bad faith conduct is relevant to both prongs. Because it alone acted in bad faith, there was no other landowner that was similarly situated. Moreover, because it had deliberately tried to "get away" with not complying with restrictions in the record plan, the County did not act arbitrarily in opposing its opening the hotel. App. 68a.

20 years. The Superior Court's Memorandum Opinion at no place even mentions the proposed deed restriction or other impairment on the ownership rights of the principals and their families. Rather, the Superior Court characterized WH's position in support of its motion to amend thusly:

> WH now seeks to assert the alternative theories of recovery . . . based upon [the County's] interference with WH's reasonable investment-backed expectations and the character of [the County's] actions.

App. 24a.

The Memorandum Opinion then goes on to specify three governmental acts that WH put in issue in seeking to amend its complaint, none of which are restrictions on future ownership: (1) the initial denial of a certificate of occupancy; (2) the Board of Adjustments' denial of nine variances; and (3) the County's denial of a renewed request for a certificate of occupancy to open a portion of the hotel. App. 24a-25a. In contrast, WH's Petition to this Court states that the issue is "whether the government's *ownership ban* constitutes a regulatory taking." Pet. at 34 (emphasis added).

In sum, WH is seeking to raise a new argument in this Court, not considered with respect to the subject Motion to Amend by the trial court or by the Delaware Supreme Court. This issue arises in the context of a denial of a motion to amend the complaint, a matter of Delaware procedure raising no federal issue. Nothing here warrants the consideration of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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NEW CASTLE COUNTY,
Respondent.

Petition for a Writ of Certiorari to the Delaware Supreme Court

REPLY BRIEF

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NEW CASTLE COUNTY,
Respondent.

Petition for a Writ of Certiorari to the Delaware Supreme Court

REPLY BRIEF

Pursuant to Rule 15.6 of the rules of this Court, Petitioner Wilmington Hospitality, LLC ("WH") submits this Reply Brief in support of its Petition for a Writ of Certiorari ("Petition") to address a new point raised in the Brief in Opposition of Respondent, New Castle County ("County").

I. THE ISSUE OF WHETHER THE OWNERSHIP BAN IMPOSED BY THE COUNTY SUPPORTS A CLAIM FOR INVERSE CONDEMNATION WAS EXPRESSLY RAISED BEFORE BOTH THE DELAWARE SUPERIOR COURT AND THE DELAWARE SUPREME COURT.

WH's third argument in support of the Petition is that the Delaware Supreme Court erred by affirming

the Delaware Superior Court's denial of WH's Motion to Amend the Complaint to allege a regulatory taking. Specifically, the courts below erred by concluding that WH could not state a claim for inverse condemnation despite allegations that the County prohibited WH, its principals, and anyone related to them from owning the property for twenty years ("ownership ban"). Petition at 31-34. In its Brief in Opposition, in response to WH's third argument, the County states, "WH is seeking to raise a new argument in this Court, not considered with respect to the subject Motion to Amend by the trial court or by the Delaware Supreme Court." Opp. Brief at 12. While it is true that neither the Delaware Superior Court's May 24, 2005 Memorandum Opinion nor the Delaware Supreme Court's December 22, 2008 Opinion specifically mentions WH's argument that the County's ownership ban constituted a regulatory taking, it is entirely inaccurate to state that this is a "new argument" that was not considered by the courts below.

In briefing on the Motion to Amend, the County argued that "WH never had a compensable property interest in a non-conforming 155,480 square foot hotel." County's Opposition to Motion to Amend Complaint, Superior Ct. Docket Item ("D.I.") 41, at 6. In response, WH asserted that the County's position "turn[ed] a blind eye to WH's rights as a landowner, including ... the right of WH and its principals to transfer or devise the property to others." WH's Reply in Support of Motion to Amend Complaint, Superior Ct. D.I. 43, at 3. During the February 23, 2005 hearing on the Motion to Amend, WH's counsel argued as follows:

Now, the first specific issue that was raised by the defense is whether or not the plaintiff has adequately alleged a property interest. What we know from the case law is that property interests can be both tangible and intangible property. That was emphasized in Ruckelshaus v. Monsanto Supreme Court decision, which, again, was cited in our papers.

And what the Court emphasized there, in referring back to the General Motors case, another Supreme Court decision, is that property is not simply the land itself. It's not simply the building. It's the rights of the citizen that inure in relation to that property.

And what are some of those rights? The right to use and enjoy that property. The right to pass on property to one's descendants. And that was emphasized in the Hodel v. Irving decision, another U.S. Supreme Court decision.

. . . .

So there are a panoply of property interests that are protected, not simply the right to the land or the right to the building, when we look at what are protectable property interests.

In looking at the partial taking inquiry, what we learned from the Monsanto case as well as the Hodel case is that one factor alone, proof of one of the three factors, can be enough. . . . In Hodel, the Court focused on the extraordinary nature of the action. Justice O'Connor spoke about the interference with one's right to pass on one's own property is such an extraordinary measure that that alone could indicate a taking.

> THE COURT: Are you defining the extraordinary interference in this case as the restriction of the participation of other family members for 20 years?
>
> MR. YANNACONE: I think that's one of them, yes. I think that's one of the extraordinary factors in this case, the fact that they had a restriction that said these family members could not inherit or get the property under any circumstances. We're also saying that the forfeiture of this interest as a condition of using the property is also extraordinary.

Transcript, Superior Ct. D.I. 151, at p.4, l.13 to p. 6, l.19. The County's response during oral argument was that the ownership ban was a "suggestion" not a "regulation." *Id.* at p. 22, ll. 4-11. In its May 24, 2005 Memorandum Opinion denying WH's Motion to Amend the Complaint, the Delaware Superior Court concluded that the only property interest WH conceivably had at stake was "a property interest in a hotel not to exceed 118,805 square feet" (App. at 26a), thereby rejecting WH's position that its property interests included the rights to freely devise and transfer the property.

In support of its cross-appeal to the Delaware Supreme Court of the trial court's May 24 decision, WH argued that the trial court mistakenly focused solely on whether WH had any compensable property interest in the square footage in excess of 118,805 square feet and overlooked WH's constitutionally protected rights to freely transfer or devise its property. WH's Ans. Brief/Opening Brief, Del. Supreme Ct. D.I. 21, at 46-47. In response, the County cited no legal authority for the proposition that interfering with the right to transfer property does not constitute a taking

but, rather, asserted as a factual matter that nothing prevented WH from transferring the property to someone else. County's Reply Brief/Ans. Brief, Del. Supreme Ct. D.I. 22, at 31 n. 73. As WH pointed out in its reply brief in the Delaware Supreme Court, the County's factual assertion contradicted the allegations of the amended complaint (specifically, ¶¶39 and 43, App. at 176a, 177a), which the trial court was required to accept as true for purposes of the Motion to Amend. WH's Reply Brief, Del. Supreme Ct. D.I. 23, at 9. Tellingly, the County never took the position before the Delaware Supreme Court that WH's argument raised a new issue not considered by the Delaware Superior Court. That is because the issue was put squarely before the trial court, both in briefing and oral argument. Thus, the County's position that WH is arguing for the first time before this Court that the ownership ban constituted a regulatory taking is wholly negated by the record below.

Respectfully submitted,

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May 4, 2009